THE

LAW RELATING TO

# GUARDIANS AND WARDS

IN BRITISH INDIA.

BY

**K. C. DESIKA CHARIAR, B.A., B.L.**

VAKIL, HIGH COURT, MADRAS.

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TO

THE HONOURABLE

SIR CHARLES ARNOLD WHITE, *Kt.*,

*CHIEF JUSTICE OF MADRAS*

THIS BOOK

IS

(WITH KIND PERMISSION)

RESPECTFULLY DEDICATED

BY THE AUTHOR.

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# PREFACE.

In publishing this book, I have done nothing beyond collecting the numerous decisions on the subject of Guardians and Wards, and placing them within easy reach of the busy advocate. Every effort has been made to collect the whole of the Indian case-law on the subject, and references have also been freely made to the leading English cases.

The notes and the cases under each section of the Guardians and Wards Act have been arranged under distinct heads to facilitate reference.

I have reprinted in the Introduction the Report of the Proceedings of the Legislative Council, the Report of the Select Committee, and the Statement of Objects and Reasons, relating to the Act; and in the Appendix, the various previous enactments and the Indian Majority Act, 1875.

The index, at the end, has been made as full and exhaustive as possible, and it is hoped that it will render easy the search for references. To increase the usefulness of the work, I have incorporated the rules made by the Calcutta High Court under the Act (*vide* s. 50); no rules have yet been made by the Bombay and Allahabad High Courts. The rules of the Madras High Court which are now under preparation will be issued in the form of a supplement, when passed into law.

I have to acknowledge the assistance derived from the various treatises on the subject, and especially from Trevelyan's valuable work on the Law relating to Minors;

NATIONAL ARCHIVES OF INDIA

and my thanks are due to my friends who favoured me with suggestions during the preparation of the book.

In conclusion, I trust that the book may meet with the approval of those for whom it is intended, and prove useful to them.

HIGH COURT,
*June*, 1901.

K. C. D.

NATIONAL ARCHIVES OF INDIA

# CONTENTS.


| | | Page. |
|---|---|---|
| I. | TABLE OF CASES CITED ... ... ... ... | xi |
| II. | ADDITIONS AND CORRECTIONS ... ... ... | xv |
| III. | INTRODUCTION— | |
| | (i) Proceedings of the Legislative Council, dated 16th March, 1886 ... ... ... ... | xvii |
| | (ii) Report of the Select Committee ... ... | xxi |
| | (iii) Proceedings of the Legislative Council, dated 11th March, 1890 ... ... ... ... | xxiii |
| | (iv) Proceedings of the Legislative Council, dated 27th March, 1890 ... ... ... ... | xxx |
| | (v) Statement of Objects and Reasons ... | ...xxxiv |
| IV. | CONTENTS OF THE GUARDIANS AND WARDS ACT, VIII OF 1890.. | xxxix |
| V. | THE GUARDIANS AND WARDS ACT, VIII OF 1890, AND NOTES THEREON ... ... ... ... ... | 1 |
| VI. | THE SCHEDULE ... ... ... ... | 79 |
| VII. | APPENDIX A (Enactments repealed)— | |
| | (i) Act XIV of 1858 ... ... ... ... | 81 |
| | (ii) Act XL of 1858 ... ... ... ... | 82 |
| | (iii) Act IX of 1861 ... ... ... ... | 89 |
| | (iv) Act XX of 1864 ... ... ... ... | 90 |
| | (v) Act XIII of 1874 ... ... ... ... | 97 |
| | (vi) Act VII of 1870, Schedule I., Article 10 ... | 107 |
| VIII. | APPENDIX B— | |
| | The Indian Majority Act, IX of 1875 ... ... | 108 |
| IX. | APPENDIX C— | |
| | Rules made by the Calcutta High Court under the Guardians and Wards Act ... ... ... ... | 110 |
| X. | INDEX ... ... ... ... ... | 115 |




NATIONAL ARCHIVES OF INDIA

NATIONAL ARCHIVES OF INDIA

# TABLE OF CASES CITED.


## A

PAGE.

Abdul Rahiman Sahib *v.* Ganapati 67, 73
Abraham *v.* Abraham .. .. 6
Adye *v.* Fednutean .. .. 40
Agar-Ellis, *In re* .. 26, 30
Akama *v.* Puttaiya .. .. 34
Alim Buksh *v.* Jhalo .. .. 77
Alimelammal *v.* Arunachellam .. 33
Alimodeed Moallem *v.* Syfoora 11, 36
Amar Nath *v.* Thakur Das .. 58
Andrews, *In re* .. 30, 43
Anpurna Bai *v.* Durgapa .. 14
Arumuga Mudali *v.* Viraraghava Mudali .. .. ..
*Additions and Corrections*
Aukhil Chunder *v.* Tripurasunduree 77

## B

Babaji *v.* Maruti .. 18, 32
Bace Sheo *v.* Ruttonjee .. .. 33
Bai Divali *v.* Hiralal .. .. 77
Bai Diwali, *v.* Moti Karson 44, 45
Bai Harkha, *In re* .. 63, 71
Bai Harkor *v.* Bai Shangar .. 61
Bai Somi *v.* Chokshi .. .. 57
Barnardo *v.* McHugh .. .. 18
Beaufort *v.* Berty .. .. 40
Bhaba *v.* Secretary of State .. 77
Bhagwanee Kunwar *v.* Parbutty Kunwar .. .. 62
Bhandu Prasad *v.* Dhiraji Kuar .. 14
Bhoocha *v.* Elahi Bux .. .. 28
Bhutnath *v.* Ahmed Hosain .. 34
Bittan, *In the matter of* .. 5
Bonomalle *v.* Hungshessur Roy .. 77
Boolchand *v.* Janokee .. .. 34
Brindabun Chundra *v.* Chundra Kurmokar .. .. 44
Bukshan *v.* Maldai .. .. 34

## C

[redacted]mpbell *v.* Mackay .. .. 44
[redacted]irman of the Municipal Commissioners for the Suburbs of Cal[redacted]ta *v.* Aneesooddeen Meah .. 69
[redacted]i *v.* Varahalamma 2, 15, 22, 71
[redacted] Moidin Kutti .. 72
[redacted]. Bilto Ali .. 47
[redacted]h *v.* Subran Koer .. 51
[redacted]natham .. 47
[redacted]ee Dossee *v.* Raj .. .. 71
[redacted]th Roy .. 7
*In re* .. 30

## D

PAGE.

Dakeshur Pershad *v.* Rewat Mehton 77
DeMazar *v.* Pybus .. .. 10
Devisme *v.* Mellish .. .. 18
Dhanmull *v.* Ramchunder Ghose .. 7
Dhuronidhur Ghose, *In the matter of the petition of* .. .. 33
Doolun Sing *v.* Torul Narain Singh 57
Duraisami *v.* Sri Duraisami .. 8
Durga Churn *v.* Nilmony Doss .. 77
Duttaram *v.* Gangaram .. 49

## E

Empress *v.* Pemantle .. .. 31

## F

Fakuriddin Chowdhry, *In the matter of* .. .. .. 23
Frederick *v.* Frederick .. .. 40
Fuseehum *v.* Kajo .. .. 28

## G

Ganesh Vithal *v.* Kusabai 69, 70
Gangabai *v.* Khasha Bai .. 72
Gangadhar *v.* Shivlingrao 42, 73
Ganga Pershad *v.* Maharanee .. 53
Gazhi *v.* Sakru .. .. 44
Ghordhandás *v.* Harivalubhdás .. *Additions and Corrections*
Ghudasama Harbhamji *v.* The Taluqdar Settlement Officer 67, 73
Gillon *v.* Mitford .. .. 41
Giraj Baksh *v.* Hamid Ali 14, 50
Girish Chowdhry *v.* Abdul Selim .. 7
Glover, *Ex-parte* .. .. 11
Gourmonee *v.* Bamasundaree .. 63
Gowrah Kooer *v.* Gujadhur Proshad 14, 33
Gungama *v.* Chendrappa .. 33
Gunjra Kuar *v.* Ablakh Pande .. 7
Guracharya *v.* Svamiraya Charya .. 14

## H

Hameeda Bibee *v.* Noor Bibee .. 73
Hanooman Pershad *v.* Babooe Munraj .. .. .. 48
Harendra Narain *v.* Moran .. 7, 52
Harendra Nath *v.* Brinda Rani 20, 21
Henry Hardy, *In the matter of* .. 27
Himnauth Bose, *In the matter of* .. 30
Honapa *v.* Mhalpai .. .. 51
Hoolash Kooer *v.* Kassee Proshad .. 14
Hunter *v.* Atkins .. .. 41
Hurrish Chunder Chowdry *v.* Kali Sunderi Debi .. 67, 73


NATIONAL ARCHIVES OF INDIA

PAGE.

Hurro Coomaree *v.* Tarini Churn .. 59
Hyder Reza *v.* Collector of Purneah. 69

I

Imtiaz-un-nissa *v.* Anwarulla 63, 71

J

Jadow *v.* Chhagan .. 18, 32
Jagannath Ramji, *Re* .. .. 5
Jairam Luxmon, *In the matter of the petition of* .. .. 4, 5
Jalbhai *v.* Manoel .. .. 2
Jhabbu Singh *v.* Ganga Bishan .. 14
Jogi Singh *v.* Kunj Behari Singh .. 77
Joshy Assam, *In the matter of* 27, 38
Jugodumba *v.* Mircha .. 20, 29
Justices of the Peace for Calcutta *v.* Oriental Gas Company .. 72
Jwala *v.* Pirbhu .. .. 30

K

Kabir *v.* Mahadu .. .. 74
Kailasa Padiachi *v.* Ponnukannu Achi .. .. .. 47
Kalee Pershad *v.* Poorno Debia .. 63
Kale Holdar *v.* Sreeram Ghose .. *Additions and Corrections*
Kalidas *v.* Subbama .. .. 36
Kally Soondery Dabia, *In the matter of the petition of* .. .. 72
Kannahi Ram *v.* Biddyaram .. 36
Kariyadan Pokkar *v.* Kayat Beeran 33
Kateeram *v.* Gendheneé .. 34
Kaye, *In re* .. .. 13, 44
Khettermohun Ghose *v.* Ramessur Ghose .. .. .. *Additions and Corrections*
Khudiram *v.* Bonwari .. .. 33
Khushal Chand *v.* Bai Mani .. 44
King *v.* Greenhill .. .. 30
—— *v.* Urilla .. .. 30
Kisto Kishore *v.* Issur Chunder Roy 22
Knee, *Ex-parte* .. .. 31
Knott *v.* Cottee .. .. 44
Kolashun *v.* Didar Buksh .. 35
Kooldeep *v.* Rajbunsee .. .. 33
Kurruppool *v.* Collector of Shahabad 29

L

Lakshmibai *v.* Shridar .. .. 33
Lala Hurro Prosad *v.* Sheik Basarath 3, 51
Lal Das *v.* Nekunjo .. .. 33
Love, *In the matter of* .. .. 69
Luchmiput Singh *v.* Amir Alum .. 77
Lyons *v.* Blenkin .. .. 26

M

Madhusudan Sing *v.* Collector of Midnapore .. .. 6
Madras Doveton Trust Fund, *In re* 55
Maganbai Purshotam Das *v.* Vithoba .. .. .. 16
Mahamed Saleh *v.* Government .. 29
Maharance Ram Bunsee *v.* Maharanee Soobh .. .. 36

PAGE.

Mahin, *In the matter of* .. 35
Mahram Das *v.* Ajudhia .. 74
Mallinson *v.* Mallinson .. 30
Mani Shankar *v.* Bai Muli .. 51
Manmohinee *v.* Jugobundhoo .. 50
Manmothonath *v.* Basanto Kumar .. 65
Mari Susai *v.* Michael .. .. 7
Matthews *v.* Brise .. .. 40
Mauji Ram *v.* Tara Singh .. 51
McGrath, *In re* .. 18, 32, 36
Meakin, *In re* .. .. 4, 5
Meltoon *v.* Gibbon .. 15, 22, 72
Mittibhayi *v.* Kottekarati .. 33
Modhoosoodhun *v.* Jadub Chunder .. 44
Mohabir Prosad *v.* Adhikari .. 72
Mohendro Nath Mookerjee *v.* Bama Soonduree .. .. 71
Mohima Chunder Biswas *v.* Tarini Sunker .. .. 63, 71
Mokoond Lal *v.* Nabadip Chunder .. 37
Muchoo *v.* Arzoon Sahoo 36, 62
Muhamdee *v.* Nazirun .. 14, 72
Mukrumunissa *v.* Abdul Jubbar .. 51
Mulchand *v.* Bhudea .. .. 44
Mungniram *v.* Gursahainand .. 7, 76
Musst. Bhikuo Koer *v.* Musst. Chamelia .. .. .. 37
Muthian *v.* Kari Pillai .. *Additions and Corrections*

N

Nabu Bepari *v.* Sheikh Mahomed 57, 65
Namasivayam Pillai *v.* Annamai Ammal .. .. 34
Narasinga Rav *v.* Venkaji Krishna 14
Narmadha Bai, *In the matter of* .. 59
Narrondas Dhanji, *In the matter of* 72
Nehalo *v.* Nawal .. .. 73
Nevin, *In re* .. .. 32
Newton, *In re* .. 26, 32
Nizamudin *v.* Anandi Prasad .. 50
Nurkadir *v.* Zuleika .. .. 35

O

Ouseley *v.* Plowden .. .. 2

P

Pakhwanti *v.* Indra Narain 63, 71
Pathan Ali Khan *v.* Bai Pannibai .. 13
Pearee Daye *v.* Hurbans Kooer .. 72
Periasami *v.* Seshadri .. .. 39
Pitamber Dey *v.* Ishan Chunder Dutt .. .. ..
Plomley, *Re* ..
Purmessur Doss *v.* Bhela
Puroma Soonduree *v.* Tara Soo

Q

Queen *v.* Gyngall
——— *v.* Nash
——— *v.* Vaughan

R

R. *v.* Fletcher
R. *v.* Nesbitt


NATIONAL ARCHIVES OF INDIA

| | PAGE. |
|---|---|
| Rainey *v.* Nobocoomar .. .. | 9 |
| Raj Lakhi Ghose *v.* Debendra Chandra Mojumdar .. | 50 |
| Ramchunder Chuckerbutty *v.* Brojonath Moozoomdar .. | 51 |
| Ram Doolary *v.* Thacoor Roy .. | 50 |
| Ram Dyal Gooye *v.* Amritlall Khamaroo .. .. .. | 12, 57 |
| Ranmal Singhji *v.* Vadilal | 47, 52 |
| Reade *v.* Krishna .. .. | 30 |
| Reg. *v.* Howes .. .. | 30 |
| Rochford *v.* Hackman .. | 26 |
| Rollo *v.* Smith .. .. | 9 |
| Rowshun Jehan *v.* Collector of Purneah .. .. .. | 10 |
| Rudraprokash *v.* Bholanath .. | 7 |

## S

| | |
|---|---|
| Sagur Dutt, *In the matter of* .. | 69 |
| Saithri, *In the matter of* 12, | 30, 38 |
| Sakhawat Ali *v.* Noorjehan .. | 62 |
| Sarat Chandra *v.* Forman .. | 30 |
| Saroda Pershad *v.* Brojonath .. | 59 |
| Satis Chandra *v.* Mohendra Lal .. | 7 |
| Shahjehan *v.* Munro .. .. | 34 |
| Shahu *v.* Hapija .. 13, | 23 |
| Shamkrishna *v.* Ram Das .. | 77 |
| Sham Kuar *v.* Mohananda Sahoy .. | 14 |
| Sham Manna *v.* Ramdyal Goohoo .. | 24 |
| Sheik Mahomed Hossein *v.* Akbur Hossein .. .. | 16 |
| Sheo Pershad *v.* Gangaram .. | 50 |
| Sheo Purshun Chobey *v.* Collector of Sarun .. .. .. | 73 |
| Shrish Chunder Mookhopadhya, *In the matter of* .. .. | 54 |
| Shurrut Chunder *v.* Raj Kissen 14, | 50 |
| Sikher Chund *v.* Dulputty .. | 53 |
| Sinaiya Pillai *v.* Munisami 49, | 50 |
| Sitaram *v.* Amir .. .. | 34 |
| Skinner *v.* Orde .. .. | 36 |
| Sobhanadri Appa Rao *v.* Sriramulu | 47 |
| Sohna *v.* Khalak Singh .. 28, | 29 |
| Soobah Doorgah Lal *v.* Neelanund Singh .. .. .. | 11 |
| Soondernarain *v.* Bennud Ram .. | 51 |
| Srish Chunder Singh, *In the matter of* .. .. 4, | 5, 10 |
| Stephen *v.* Stephen .. .. | 7, 76 |
| Stourton *v.* Stourton .. .. | 32 |
| Sunraj Kuari *v.* Ambika Prasad .. | 65 |
| Suntosh Ram *v.* Gera Pattuck .. | 34 |

## T

| | |
|---|---|
| Talbot *v.* Shrewsbury .. .. | 43 |
| Taylor, *In re* .. .. | 31 |
| Teynham *v.* Lennard .. .. | 44 |
| Tiruvengadamier *v.* Periasami .. | 14 |
| Tusneef Hossein *v.* Sookhoo .. | 62 |

## V

| | |
|---|---|
| Vallabdas *v.* Krishnabai .. | 3, 75 |
| Vasudev Vishnu *v.* Narayan Jagannath .. .. .. | 76 |
| Venkamma *v.* Savitramma .. | 33 |
| Venkiah *v.* Venkata .. 11, | 13 |
| Virupakshappa *v.* Nilgangava .. | 14 |
| Vizia Rama Razu *v.* Secretary of State .. .. .. | 59 |

## W

| | |
|---|---|
| Wajibun *v.* Kadir Buksh .. | 47 |
| Ward *v.* St. Paul .. .. | 11 |
| Wellesley *v.* Duke of Beaufort 26, | 44 |
| Wellesley *v.* Wellesley .. .. | 46 |
| Wilkinson *v.* Parry .. .. | 40 |

## Y

| | |
|---|---|
| Yeknath *v.* Warubai .. .. | 7 |

## Z

| | |
|---|---|
| Zain-ul-Abdin Khan *v.* Mahamud Ashgar Ali .. .. | 53 |


NATIONAL ARCHIVES OF INDIA

NATIONAL ARCHIVES OF INDIA

# ADDITIONS AND CORRECTIONS.

Page 7, after line 15, *add* "The appearance of the alleged minor may be taken into consideration in deciding the question of minority; *Khettermohun Ghose* v. *Ramessur Ghose*, W. R., 1864, C. R., 304; but it is not evidence of the highest order; *Kale Holdar* v. *Sreeram Ghose*, W. R., 1864, C. R., 366."

,, ,, note 2, *add Ghordhandás* v. *Harivalubhdás*, I. L. R., 21 Bom., 281.

,, 22, note 2, *for Kisto Kishore* v. *Issen Chunder*, *read Kisto Kishore* v. *Issur Chunder Roy*.

,, 33, note 5, *add* "See also *Muthian* v. *Kari Pillai*, 10 Mad. Law Jour., 309."

,, 34, note 2, *add* "According, however, to the general practice of the Hindu community in the Madras Presidency, the husband is not, as against the parents, entitled to the custody of his wife before she attains puberty; *Arumuga Mudali* v. *Viraraghava Mudali*, 10 Mad. Law Jour., 69."

,, 35, note 4, *for* 24 W. R., C. R., 44 *read* 24 W. R., Cr. R., 44.

,, 74, note 1, *for Mahram Das* v. *Aiudhia*, *read Mahram Das* v. *Ajudhia*.

NATIONAL ARCHIVES OF INDIA

NATIONAL ARCHIVES OF INDIA

# INTRODUCTION.

## (i). PROCEEDINGS OF THE LEGISLATIVE COUNCIL, DATED 16th MARCH, 1886.

On the 12th March, 1886, the Hon'ble Mr. Ilbert in moving for leave to introduce a Bill to consolidate and amend the law relating to Guardian and Ward, said:—

"The Law of British India on the subject of guardians and wards, so far as it has been reduced to shape by the legislature, is to be found in a single Act applying, approximately, to European British subjects, and in several Acts and fragments of Acts and Regulations applying to persons who are not European British subjects.

"In the territories subject to the jurisdiction of the chartered High Courts, the charters of those Courts provide for appointing guardians of European British minors, and, to a certain extent, of other minors also. But some years ago it was found that there was a gap in the law with respect to appointing guardians for European British minors in those parts of the country to which the jurisdiction of the chartered High Courts does not extend, and it was in order to fill the gap that my predecessor Sir A. Hobhouse introduced and passed the European British Minors Act of 1874 (XIII of 1874). This Act applies, speaking roughly, to European British subjects (I say 'speaking roughly', because the definition of the class to which the Act applies does not correspond quite precisely to the definition of European British subjects in the Criminal Procedure Code), and extends to those parts of British India which are not within the jurisdiction of the chartered High Courts. It declares the power to appoint a guardian by will or other instrument; it prescribes the procedure to be observed on an application to the Court for the appointment of a guardian; and it lays down a few simple general rules, taken from the English law, with respect to the considerations to be observed in the appointment of guardians by the Court, and to their powers and duties when appointed by the Court, or otherwise.

"Thus with respect to European British subjects we may say that the law as to the appointment, powers and duties of guardians is to be found either in the charters of the High Courts and in the principles of English law and rules of procedure observed by those Courts, or in the European British Minors Act of 1874, which to some extent codified those principles and rules.

NATIONAL ARCHIVES OF INDIA

"The legislation with respect to the guardianship of minors not belonging to this class, that is to say, with respect to Hindus and Muhammadans generally, is, as I have said, to be found in several Acts and fragments of Acts and Regulations. There is an Act of 1858 (XL of 1858) which was passed for the Bengal Presidency and which has been declared to be in force in the Punjab, Oudh, British Burmah and elsewhere. There is an Act of 1864 (XX of 1864) which applies to the Bombay Presidency, and which follows, with some variations the Bengal Act of 1858. For Madras there does not appear to be any single Act corresponding to the Bengal Act of 1858 and the Bombay Act of 1864, but several scattered provisions relating to guardians are to be found in the Regulations and Acts applying to the Madras Presidency. Then there is a general Act of 1861 (IX of 1861) extending to the whole of British India. And lastly there are numerous local Acts constituting Courts of Wards for the different provinces and defining their powers and duties.

"The legislative proposals which I am now about to make originated in some correspondence which took place between the Government of India and the Government of Bombay in the year 1881. The Bombay Government directed attention to certain defects in the Act of 1864, and suggested an amendment of the Act in order to remove difficulties which had been experienced in the administration of minors' estates under its provisions. (I may explain that the Act of 1864, though applying only to the Bombay Presidency, is an Act of this Council and therefore can be only amended by this Council.) The Legislative Department was compelled to admit the justice of the Bombay criticisms, but found, on looking into the matter, that several of them were applicable to the Bengal Act also, and that there was room for material improvement both in the form and in the substance of the different Acts relating to guardians in force in different parts of the country. The conclusion to which I myself was disposed to come when I first took up the subject was that the best way of dealing with it would be—

(1) to extend the European British Minors Act to the whole of British India, including the Presidency-towns, and to make it applicable to all the classes to which the Indian Succession Act applies; and

(2) to repeal the Bengal and Bombay Minors Acts and the corresponding Madras enactments and to supersede them by an Act which should extend to the whole of British India.

"Thus there would be two general Acts, one applying to persons who, speaking broadly, are under English law, and the other to persons, like Hindus, Muhammadans and Buddhists, whose family relations are governed by personal laws differing materially from the English law.

NATIONAL ARCHIVES OF INDIA

"Before, however, bringing any such proposals before the Council I thought it advisable to consult Local Governments about them; and accordingly the Government of India issued a Resolution on the 17th October, 1882, asking for the opinions of Local Governments and Administrations on certain points which were discussed in the Resolution. Some time elapsed before we obtained the replies to these inquiries, and the reply of the Calcutta High Court did not reach us until last year. I mention this, not by any means for the purpose of complaining of the High Court, because I know how difficult it is for the Judges to find time for considering intricate legislative proposals, but merely for the purpose of explaining the interval which has elapsed since the issue of the Government Resolution of 1882.

"The opinions which have been received in response to this Resolution have been of the greatest possible value, and they have been most carefully studied in the preparation of the measure which I am asking leave to introduce In some respects they have induced me to modify the conclusions to which I had previously been disposed to come. For instance, whilst desiring to make the general law uniform in the different provinces, I originally thought it would be best to have two Bills, one providing the law for persons under the Indian Succession Act and the other for all other classes of persons. The proposal to make the law uniform in the different provinces has been generally approved; but several high authorities, among whom I may mention Sir C. Turner, the late Chief Justice of Madras, Sir C. Sargent, the Chief Justice of Bombay, Mr. Justice West, our Advocate-General Mr. Paul, and the Advocate-General of Madras Mr. O'Sullivan, thought that our original proposals did not go far enough in the direction of uniformity, and that it would be possible and preferable to have one law for all classes of the population. On further consideration I think that they are right. Of course nothing can be further from my intention than to interfere with Hindu family customs or usages or to force Hindu or Muhammadan family law into unnatural conformity with English law. But on looking into the European British Minors Act, which was framed with special reference to the requirements of what may be called English minors, it appeared to me that almost all its simple and general provisions were applicable, or might with a little modification be made applicable, to Hindu and Muhammadan as well as to English guardians; and I was very glad to be told by my friend Mr. Mandlik, who has been looking at the draft Bill from the Hindu point of view, that he agrees with me about this.

"Accordingly what I have done has been to take as my model the European British Minors Act, which is the latest and fullest of the Indian Acts relating to guardians, and to frame on its lines an Act applicable as a whole to all classes of the community, but containing a

NATIONAL ARCHIVES OF INDIA

few provisions limited in their application to particular classes. If the Bill is sent to a Select Committee, it will doubtless, whilst before the Committee, undergo careful scrutiny on behalf of the several classes to whom it is to apply; and should it turn out that any of its provisions are unsuitable to any of those classes, it will be easy to modify them or to further limit their application. In the mean time I need only repeat that it is not intended by this measure to make any alteration in Hindu or Muhammadan family law.

"The Bill will supersede and repeal the Acts 1858 and 1864, the general Act of 1861, the Madras enactments to which I have referred and European British Minors Act of 1874. But it will not repeal or supersede the enactments relating to the different Courts of Wards. The Provisions of those enactments are intimately connected with the administrative machinery of the different provinces; and it would be either impossible, or at least very difficult, to supersede them by a general Act applying to the whole of India. They will be accordingly left outstanding. The Bill will relate only to such guardians as are appointed or recognised by the ordinary Civil Courts, and there will be an express saving for the jurisdiction and authority of the different Courts of Wards.

"There will also be a saving for the powers of the chartered High Courts under their respective charters. The Act will apply to those High Courts in the exercise of their original jurisdiction, and I should myself have preferred to enact, as in section 150 of the Probate and Administration Act, 1881, that when proceedings are taken in the High Court with respect to the appointment or control of a guardian they should be taken under the new Act and not otherwise. We should thus sweep away a good deal of vague and antiquated law, and substitute for it a set of rules which would, I believe, be quite as easy to work, and certainly more easy to ascertain. However, in deference to what appear to be the views of the High Courts on this point, the Bill will provide that the jurisdiction of the High Courts, under their charters is to be maintained alongside of their jurisdiction under the Act.

"It will be necessary to supplement this Bill by making certain amendments in that chapter (XXXI) of the Civil Procedure Code which deals with suits by and against minors, but those amendments will be made by a separate measure which is now in course of preparation.

"I may have an opportunity at a later stage of explaining the more important provisions of the Bill which I am asking leave to introduce; at present I am only concerned to show that a case for legislation has been made out."

The Hon'ble Rao Saheb Vishvanath Narayan Mandlik said:—"As the Hon'ble Mr. Ilbert has kindly referred to the part I have taken in

NATIONAL ARCHIVES OF INDIA

going over the draft of this Bill, I wish to say that I think, generally speaking, that its provisions are suitable, and that any difficulties which may present themselves may be further considered in the light of further representations. There is, however, one important point, namely, that of united Hindu families and the guardians of minors who form members of such families. I believe that a recent decision of the Privy Council has introduced some difficulty in the matter of guardians so appointed. I have no doubt that that difficult point will be further considered and suitably provided for when the Bill goes to a Select Committee."

The motion was put and agreed to.

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## (ii). REPORT OF THE SELECT COMMITTEE ON THE BILL.

The following Report of the Select Committee on the Bill to consolidate and amend the law relating to Guardian and Ward was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 7th March, 1890 :—

We, the undersigned members of the Select Committee to which the Bill to consolidate and amend the law relating to Guardian and Ward was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. The Bill was introduced in 1886, and was considered by a Select Committee in 1887. That Committee made many amendments in the Bill, but decided not to submit a report, partly because the Bill contained a clause respecting the appointment of guardians for minor members of undivided families about which there was much difference of opinion, and partly because the Calcutta High Court considered that the Bill did not hold out sufficient inducement to *de facto* guardians to subject themselves to the provisions of the proposed Act.

On these two matters Local Governments have since been specially consulted, and in undertaking the re-consideration of the Bill as amended in 1887 we have had the benefit of their advice.

The weight of authority is distinctly adverse to the retention of the clause respecting the appointment of guardians for minor members of undivided Hindu families, and we have removed that clause from the Bill.

The inducements to *de facto* guardians to subject themselves to the proposed Act are several. No fees will be payable in respect of the

NATIONAL ARCHIVES OF INDIA

appointment of guardians (section 2): a *de facto* guardian acting without appointment by the Court will incur the risk of being superseded on an application by the Collector (section 8): appointed guardians may be properly-remunerated for their care and pains in the execution of their duties (section 22): testamentary and appointed guardians will have the powers possessed by executors and administrators, respectively, under the Probate and Administration Act, 1881, and will be in a position to pass secure titles (sections 28 and 29): appointed guardians may protect themselves by applying for, and acting upon, the direction of the Court (section 33), and the submission of accounts by them is no longer to be obligatory, but to be left to the discretion of the Courts under the rules of the High Court (sections 34 and 50 (1) (*d*)): joint guardians may come to the Court for the settlement of their differences (section 43): and certain privileges are conferred on appointed guardians by clauses B, C and D of the section (section 53) amending Chapter XXXI of the Code of Civil Procedure. In the opinion of most of the authorities consulted these inducements were sufficient, but we have now added to them the provision in clause A of section 53 that, where a guardian has been appointed for a minor by the Court, a suit is not to be instituted in the name of the minor by any other person as next friend without the leave of the Court to be granted after hearing any objection which the guardian may have to make with respect to the institution of the suit. This provision will, we believe, be very valuable in practice and it will further tend to remove the objection which was taken to the Bill by the Calcutta High Court.

3. **Section 4.**—We have amended the definition of "minor", extended that of "European British subject", and made it clear that "District Court" includes a High Court in the exercise of its ordinary original civil jurisdiction.

4. **Sections 5 and 15.**—Here, as regards European British subjects, we have followed as closely as possible the provisions of the guardianship of Infants Act, 1886 (49 and 50 Vic., Cap. 27).

5. **Section 17.**—Sub-section (5) of this section makes it sufficiently clear that neither a Collector nor any other person can be appointed a guardian against his will.

6. **Section 22.**—Where a Collector is appointed guardian, fees will be chargeable for the maintenance of his special establishment as they are chargeable in the case of estates under the superintendence of the Court of Wards.

7. **Section 23.**—This section will, of course, be read under section 3 as subject to such enactments as section 193 of the North-Western Provinces Land-revenue Act, 1873.

NATIONAL ARCHIVES OF INDIA

8. **Section 39.**—We have followed the Guardianship of Infants Act, 1886, in making a testamentary guardian removeable on the same grounds as a guardian appointed by the Court.

9. **Section 43.**—Following section 3 of the same Act, we have provided here for the settlement of differences of opinion between joint guardians.

10. The other amendments in the Bill since its introduction are numerous, but do not appear to us to call for remark.

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## (iii). PROCEEDINGS OF THE LEGISLATIVE COUNCIL, DATED 11th MARCH, 1890.

On the 17th March, 1890, the Hon'ble Mr. Scoble presented the report of the Select Committee on the Bill to consolidate and amend the law relating to Guardian and Ward. He said :—

"This Bill was introduced nearly four years ago by my hon'ble friend Mr. Ilbert, and, as the constitution of the Council has changed considerably since its introduction, I think it desirable, in presenting the report of the Select Committee, to say a few words as to the objects of the measure and the general scope of its provisions.

"The Hindu and Muhammadan, as well as the English, law lays down certain general principles regarding the relationship of guardian and ward, and the application of these general principles has been regulated by several enactments of the Indian legislature. Besides the numerous local Regulations and Acts constituting Courts of Wards for the different Provinces, and defining their powers and duties, there are several Acts of this Council making provision for the care of the persons and property of Hindu and Muhammadan minors not brought under the superintendence of these Courts. Act XL of 1858 was passed with this object for the Bengal Presidency, and its operation extends also to the North-Western Provinces and Oudh, the Punjab, Lower Burmah, the Central Provinces and Ajmere Act XX of 1864 reproduces for the Bombay Presidency, with some variations, the Bengal Act of 1858. Act IX of 1861 amends the law for hearing suits relative to the custody and guardianship of minors in British India generally. As regards minors who are European British subjects, the Supreme Courts, and afterwards the High Courts, had jurisdiction under their charters; and Act XIII of 1874 provided for minors of this class resident in those parts of the country to which the jurisdiction of the chartered High Courts does not extend.

NATIONAL ARCHIVES OF INDIA

"In 1881 the Bombay Government drew attention to certain defects in Act XX of 1864, and suggested an amendment of the Act in order to remove difficulties which had been experienced in the administration of minors' estates under its provisions. Examination showed not only that the Bombay criticisms were sound as regards the particular Act in force in that Presidency, but that several of them were applicable to the Bengal Act also, and that there was room for material improvement both in the form and in the substance of the Acts generally. Before taking action, however, Local Governments and other authorities were consulted, with the result that the Bill now before the Council was introduced by Mr. Ilbert on the 12th of March, 1886.

"In his speech on that occasion my hon'ble friend indicated with great clearness the lines on which the Bill had been framed.

"'Nothing', he said, 'can be farther from my intention than to interfere with Hindu family customs or usages, or to force Hindu or Muhammadan family law into unnatural conformity with English law. But, on looking into the European British Minors Act, which was framed with special reference to the requirements of what may be called English minors, it appeared to me that almost all its simple and general provisions were applicable, or might with a little modification be made applicable, to Hindu and Muhammadan as well as to English guardians. . . . . Accordingly what I have done has been to take as my model the European British Minors Act, which is the latest and fullest of the Indian Acts relating to guardians, and to frame on its lines an Act applicable as a whole to all classes of the community, but containing a few provisions limited in their application to particular classes. . . . . It is not intended by this measure to make any alteration in Hindu or Muhammadan family law.'

"In the second place, my hon'ble friend stated—

"'The Bill will not repeal or supersede the enactments relating to the different Courts of Wards. The provisions of those enactments', he said, 'are intimately connected with the administrative machinery of the different provinces; and it would be either impossible, or at least very difficult, to supersede them by a general Act applying to the whole of India. They will accordingly be left outstanding. The Bill will relate only to such guardians as are appointed or recognised by the ordinary Civil Courts, and there will be an express saving for the jurisdiction and authority of the different Courts of Wards.'

"Lastly, my hon'ble friend proposed,

'in deference to what appear to be the views of the High Courts on this point, . . . . . that the jurisdiction of the High Courts under their Charters is to be maintained alongside of their jurisdiction under the Act.'

NATIONAL ARCHIVES OF INDIA

"Since the Bill came into my hands the principles thus laid down have been carefully adhered to. Its provisions have been most attentively considered by two Select Committees, and it has been twice referred for opinion to Local Governments. If it now fails of completeness as a consolidation of the law on the subject to which it relates, it is not for want of consideration, but because consideration has shown the difficulties which stand in the way of complete treatment of so complicated a subject. *Ad ea quæ frequentius accidunt jura adaptuntur:* exceptional cases must be left to be dealt with by the Courts of law, as they arise.

"I do not propose to take up the time of the Council with a minute examination of the provisions of the Bill, but merely to call its attention to some of its principal enactments.

"In the first Chapter a minor is defined to mean a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. That Act fixes the age of eighteen as the age of majority generally for persons domiciled in British India; but it postpones it to twenty-one years in the case of minors of whose person or property a guardian has been appointed by a Court of Justice or who is under the jurisdiction of a Court of Wards. In the opinion of the Select Committee it was considered desirable to adopt this definition, rather than leave the matter open to discussion. Where there is a distinct provision of the law upon any particular subject, it should, I think, unless the law is shown to require amendment, be followed in subsequent legislation. Acting on this principle, while adopting the definition of European British subject given in the Code of Criminal Procedure, the Select Committee has extended that definition so as to include any Christian of European descent.

"In Chapter II, which relates to the appointment of guardians, we have provided (section 6) that in the case of a minor who is not a European British subject nothing in the Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject. And we provide that the Court may, upon proper application, either appoint or declare a person to be guardian, when it is satisfied that it is for the welfare of a minor that the care of his person or the management of his property should be entrusted to a guardian. We thus recognise both species of guardianship—that which arises independently of, as well as that which is created by, the action of the Courts. The High Court of Calcutta had expressed the opinion that, 'without compelling a *de facto* guardian in every case to come to the Court for a certificate, the Bill should be so framed as to make it necessary for guardians of large estates to place themselves under the control and supervision of the Court.' A special reference was made to ascertain the general opinion of the public on this point, with the



NATIONAL ARCHIVES OF INDIA

result that the Select Committee have not adopted the suggestion of the High Court. The opposite view is tersely expressed in a letter from the Government of the North-Western Provinces and Oudh :—

"'After carefully considering the suggestion of the Hon'ble the Judges of the High Court at Calcutta, the Lieutenant-Governor is decidedly of the opinion that it is undesirable to add to the Guardians and Wards Bill any provision which would have the effect of making it compulsory in these Provinces to the guardians, even of large estates, to place themselves under the control of the Civil Courts. The facilities afforded by the present draft Bill for bringing estates, where that course is desired in the interests of the minor, under the charge of the Civil Courts are, he considers, amply sufficient. Any legislation which made it compulsory, instead of optional, might have the effect of deterring in many cases the fittest persons from accepting responsibility which is of an onerous nature even when exercised independently, and would add largely to the work of the Civil Courts without, as far as His Honour can see, securing any material compensating advantage to the estates.'

"To the same effect is the opinion of the Bombay Government :—

"'It appears to the Governor in Council, on a consideration of the advantages and disadvantages of the proposal that every *de facto* guardian of a minor and his estate should place himself under the superintendence of the Civil Courts, to be both needless and undesirable that such an enactment should be embodied in the Bill. In cases of large estates or of complicated transactions, the *de facto* guardian will almost necessarily come to the Court for his own security, or will be brought in to the Court by persons interested in the minor or his estate. If litigation and official interference can be avoided,—and in many cases they are clearly unnecessary,—it is distinctly beneficial that they should be avoided. The superintendence of a Court over the minute and detailed management of a considerable property or business cannot, in the opinion of the Governor in Council, be exercised without a great deal of expense, and must lead to elaborate explanations and measures for putting every transaction into an indisputable shape, such as are a serious clog on the effectual administration of ordinary affairs.'

"The Lieutenant-Governor of the Punjab is equally adverse to the proposal. The Secretary to the Government of the Punjab writes :—

"'As the Bill now stands, no guardian is compelled of his own motion to place himself under the control of the Court; but the judge is empowered to apply the provisions of the law on the application of the Collector, the relative or friend of a minor, or a person desirous of being, or claiming to be, the guardian of the minor. It is because the Bill does not compel the Court to appoint or declare a guardian except upon good cause shown that in Sir James Lyall's opinion its provisions are not unsuitable to the present circumstances of the Punjab. If,

NATIONAL ARCHIVES OF INDIA

however, the suggestion made by the Judges of the Calcutta High Court is accepted, rendering it necessary that in certain cases the law shall be applied, the Lieutenant-Governor would prefer that the provisions of the Act should not be applied to this Province until extended by a Notification issued by the Government of India on the recommendation of the Local Government. It must be remembered that in the Punjab there are no large Zamindari estates of the character of those existing in the North-Western Provinces and in Lower Bengal, and the Collector of a Punjab District has ample opportunities of knowing whether the interests of a minor who owns considerable property demand the assistance of the Court to secure him from loss in the management of that property. Therefore to compel all guardians of large estates to place themselves under the control and supervision of the Court would be to legislate for a condition of things scarcely existent in this province, where more interference than is absolutely necessary is to be deprecated.'

Raja Rajendralala Mitra, in a letter of the 25th October, 1889, speaking from an intimate knowledge of the feeling of Native society on the point, writes:—

"'It is well known that private guardians are more economical and useful than official guardians, but that such offices being entirely gratuitous there is no temptation to accept them, and every attempt to make them irksome by unnecessary multiplication of duties and responsibilities, by calls for periodical accounts, securities and bonds, is to cause a strong revulsion of feeling which would greatly reduce the number of eligible candidates. Nor is it at all required in the interests of wards and out of regard for the wills of the testators who provide for the custody of their minor sons and daughters and their property. The strongest point urged refers to the submission of periodical accounts; but I am disposed to think it will be of little practical utility—a vain formality at best. I know of no Court which will have the patience and the leisure necessary to go through the domestic accounts of little boys; and, if it did, it will, in the absence of a contending party, do nothing to prevent waste or peculation.'

"It appeared to the Select Committee that there was much force in these objections, and, while giving guardians every opportunity and inducement to place themselves under the control of the Court, we have not thought it necessary or desirable to compel them to do so.

"Another important question has arisen with regard to the appointment of guardians of minors who are members of undivided Hindu families. My valued friend, our late colleague Rao Saheb Vishvanath Narayan Mandlik, whose assistance in the earlier labours of the Committee on the Bill I desire gratefully to acknowledge, called attention to this difficulty when the Bill was introduced, and framed a section which he considered

NATIONAL ARCHIVES OF INDIA

would meet the case. He proposed that, when the Court had reason to believe that the interests of such a minor were in peril, it might appoint or declare a guardian to protect those interests, under such restrictions as would prevent him from interfering unduly with the powers of the managing member of the family. But upon mature consideration the Select Committee have not accepted this suggestion, which, so far as they can ascertain, is not approved by the Hindu community generally. It is well pointed out by Mr. Bipin Krishna Bose, Government Pleader in the Central Provinces :—

" 'Where the property of a minor exists in no other shape than that of an interest in undivided property of a joint family governed by the Mitakshara, it is difficult to understand how a stranger can be introduced into the family to protect the interests of the minor without interfering with the powers of the managing member and in a manner changing the constitution of the joint family.

" 'In a joint family under the Mitakshara there is absolute unity of ownership, and no member can claim to have any specific portion of the family income paid over to him as his share. All he can ask for is that he may be allowed the use of the family property along with the other members. For those who are interested in the welfare of a minor member, and who desire to secure to him the full fruition of his rights in the family estate, the only proper remedy is to procure for him a specific share by means of partition. To introduce a stranger in the joint family with powers of interference which must, from the nature of the case, be to a great extent vague and undefined would only lead to discord and disunion, and is very unlikely to bring about better management of the family estate. Generally, the self-interest of the managing member, and, where there are other adult members, their supervision over his action, and in many cases ties of natural love and affection, would ensure proper management of the family property, in the benefit of which the minor would participate Cases are rare where a managing member, by himself or in collusion with the other members, sets about wasting the family estate with a view to sacrifice the rights of a minor member. Under the Dayabhaga, however, the shares of the members are numerically defined before partition, and although the particular portion which constitutes a member's share remains in an unidentifiable condition until partition, he may demand, and obtain of the managing member his share of the family income. In such a case no disruption of the joint family would ensue if the Court were to make provision through a specially appointed manager for the disposal of a minor member's share of the profits for his sole and exclusive benefit.'

" No special provision has therefore been introduced into the Bill to meet these cases, as an adequate remedy appears to be available under the existing law.

NATIONAL ARCHIVES OF INDIA

"I have now disposed of the two main points of controversy which have arisen upon this Bill. Recognizing the right of the parent to appoint by will or other instrument a guardian for his infant children, the Bill also recognises the duty of the Court to appoint a guardian where none has been appointed, and to decide between conflicting claims when several persons assert a title to the guardianship. The Bill lays down certain general rules for the guidance of Courts with respect to the considerations to be observed in appointing a guardian, and the most important of these will be found in sections 12, 15, 17 and 19.

"The third Chapter, relating to the rights, duties and liabilities of guardians, is taken principally from the European British Minors Act, and a guardian is placed, in reference to his dealings with the property of his ward, on very much the same footing as an executor or administrator with regard to the property of a deceased person. Section 33 provides that a guardian appointed or declared by the Court may apply to the Court for advice in the execution of his duties, and will be protected if he acts in good faith on that advice. This provision will, it is believed, have the effect of inducing guardians, especially where large estates are entrusted to them, voluntarily to place themselves under the supervision of the Court. Section 39 points out the circumstances under which the Court may interfere to remove any guardian, testamentary or otherwise, from his guardianship.

"The fourth Chapter contains supplemental provisions, the most important of which are those which relate to suits brought or defended on behalf of minors by next friends or guardians *ad litem*. These suits are often merely vexatious, but are sometimes brought *bonâ fide* for the benefit of a minor whose guardian is either careless or corrupt. Section 53 endeavours to guard against abuse of the power of interference by providing that, if a minor has a guardian appointed or declared by a competent authority, a next friend shall not be allowed to institute any suit on behalf of the minor, except upon notice to the guardian and upon satisfying the Court that it is for the welfare of the minor that he should be permitted to do so This, it is hoped, will have the effect of preventing much unnecessary litigation."

NATIONAL ARCHIVES OF INDIA

## (iv). PROCEEDINGS OF THE LEGISLATIVE COUNCIL, DATED 27th MARCH, 1890.

On the 21st March, 1890, the Hon'ble Mr. Scoble moved that the Report of the Select Committee on the Bill to consolidate and amend the law relating to Guardian and Ward be taken into consideration.

The Hon'ble Rao Bahadur Krishnaji Lakshman Nulkar said :—

" I beg leave to make one or two observations on the general policy which the Indian Legislature has to follow in steering clear of difficulties presented by the different religions, and the multiplicity of social and domestic customs, to be found among the different races, communities, castes and tribes into which the Indian populations are divided. These difficulties assume a more or less practical form in the actual administration of the laws passed here, when these touch the dividing line between questions of personal and property rights on the one side and the religious and social or domestic customs and usages having the force of law on the other. Two of the measures which this Council has had to deliberate upon during the present session furnish apt illustrations of the difficulties I am alluding to, namely, the Charitable Endowments Bill, (now Act VI of 1890) and the Bill now under consideration relating to guardian and ward. In both a more efficient safeguard had to be provided for a certain description of public and personal properties without unduly interfering with the religious, social and domestic institutions or susceptibilities of the people concerned. The criticisms which gathered round these Bills elicited opinions almost diametrically opposed to each other, the one representing that the measures did not go far enough, and the other expressing doubts whether they might not be said to be going too far for the necessities of the case. In the first instance, while one party expressed the desire that malversation of even religious endowments should be prevented by the Executive Government undertaking their direct management, the other strongly advised strict adherence to the policy of avoiding all connection between District-officers and such management. As regards the Bill under consideration, the questions involved are even more complicated, and consequently the criticisms are not less divergent. It was suggested by some that all guardians should be compelled to place themselves entirely under the executive control of the Civil Courts, and those Courts should be further empowered to interpose by taking part in the management on behalf of minors when they are members of undivided Hindu families; while others pointed out the danger of such provisions, which were further shown to be unnecessary in the presence of other less objectionable remedies provided by the existing law. And thus it required quite four years of correspondence and consideration to find a

NATIONAL ARCHIVES OF INDIA

safe way, as far as it was possible, out of all these difficulties. It seems to me that in considering both these measures the Select Committees have, so far as they could, steered clear of the dangers both of over-legislation and of unnecessary interference with delicate questions of religious, social and domestic concerns of the people, the general laws relating to the points raised being considered sufficient to meet the contingencies brought to notice. If the parties concerned fail to avail themselves of the ample remedies already provided, such failure is traceable to lack of public spirit and a proper sense of duty on their part. These considerations are peculiarly apposite as regards various topics of social reform which have of late been exercising the minds of my countrymen. While the activities and agitations which are going on for some time past in the different parts of India are healthy signs of the awakening of the Hindu mind to a sense of responsibility on the all-important subject of social reform, the calls for special legislation now and then made deserves a mature and sober consideration on the part of those who make them. As a general proposition, it is undeniable that in India the interests of minors and women call for special protection, and the statute-book presents evidence of the attempts made from time to time to adequately safeguard those interests. If it could be shown that after actual trials the existing legal remedies are not found sufficient to prevent the authority of parents and heads of families from being flagrantly and criminally abused, it seems to me that an appeal to the Legislature for further help would be appropriate. But the fact must never be lost sight of that, while in these days the laws of a country may provide remedies against abuse of the authority in question, it is for the intelligent, influential and public-spirited citizens to see that these remedies are fully and timely resorted to, and found to be defective, before calling for amendment or blaming Government for the existence of the alleged defects; because the path of the Legislature in successfully handling these delicate matters is no smoother than that of the active social reformer in the presence of the diversity of opinions strongly held and persisted in with phenomenal tenacity by all parties to the controversy."

The Hon'ble Mr. Evans said:—"The Hon'ble Member in charge of the Bill has so thoroughly laid before the Council on the last occasion, when presenting the Report of the Select Committee, the whole history of the main provisions of the Bill, that it is unnecessary for me to follow him upon those points. I desire only to say that, so far as this is a Bill for consolidating the existing provisions, I hope it will be useful in that it gathers them together to a great extent in one Act. As for the remainder, it has been an exceedingly arduous task for the Select Committee, as has just been pointed out, to steer clear of the great difficulties connected with this question. On the one hand, they had to provide

NATIONAL ARCHIVES OF INDIA

sufficient safeguards for the persons and properties of minors, and, on the other, to avoid disturbing the habits and feelings of the Native community, and also they had to avoid giving fresh facilities for a most undesirable class of harassing litigation in which infants are used as pawns on the chessboard of litigation in order to harass adult members of the family. They also had to avoid, so far as possible, throwing upon the District Courts large and responsible duties which they have no practical machinery for performing. The task has been a difficult one, and the Select Committee have endeavoured to meet it in the most practical manner they could. What success they have achieved can only be discovered by the working of the Act. The success of the Act very much depends upon the discretion with which it may be worked by District-officers. I hope the powers which have been given to the High Courts for assisting the District-officers in the exercise of their discretion by means of rules will prove of aid to them. If the Act is worked with discretion by District-officers, I hope it may prove successful."

The Hon'ble Raja Durga Charn Laha said:—"I was a member of the Select Committee which considered the Bill. There were two important points upon which there was considerable difference of opinion. A Committee of the Hon'ble Judges of the Calcutta High Court was of opinion that, without compelling a *de facto* guardian in every case to come to the Court for appointment or a declaration of his title, the Bill should be so framed as to make it necessary for guardians of large estates to place themselves under the supervision of the Court. It is clear from this statement that the Committee of the Hon'ble Judges thought that it was not absolutely necessary for a guardian, in the interests of a minor, to resort to the Court in all cases. By not resorting to the Court the guardian is free to act on his own responsibility, without being hampered with the obligation of making references and applications to the Court for orders regarding every small matter, and he is left in a great measure to act on his own discretion. With all deference to the opinion of the Hon'ble Judges, no legal check should, I think, be devised to harass him in the management even of a large estate under his charge. The only way in which he could be made to place himself under the control and supervision of the Court would be to compel him to submit periodical accounts. It is only in the case of dishonest guardians that such a safeguard would be necessary. Provision is made in the Bill to guard against such contingencies Sections 36 and 37 provide that all guardians and their heirs are liable to the minor for acts done by the guardian, whether appointed and declared or not; and the Bill gives the Court power to remove a guardian for any wrongful acts. These provisions, I submit, are sufficient to protect the interests of minors whenever their guardians act in a dishonest or wrongful way. In the case of honest and

NATIONAL ARCHIVES OF INDIA

conscientious guardians, any interference by the Court with their management would only tend to cripple their usefulness. These *de facto* guardians act as a rule without remuneration, and to harass them with a liability to file accounts would be to dissuade them from taking upon themselves the trust. The consequence would be that in a large number of cases inferior persons of doubtful honesty would be entrusted with the management of these estates, while subjecting them to increased expense. The value of the advantage which a minor's estate often derives from the supervision of a guardian, who would only undertake the trust out of regard to the ward, cannot be overrated. No paid agency could do the work of management so efficiently as he would. He would not accept the trust if he were to be troubled with Court interference; and to prevent him from undertaking the work would be to do a great injury to the minor's estate. Under the circumstances, it would have been injudicious, in my opinion, to frame the Bill in such a way as to compel a *de facto* guardian even of a large estate to place himself under the control and supervision of the Court.

"Opinions were also divided as to the expediency of making a provision in the Bill relating to the appointment of guardians in cases in which the interests of minor members of undivided Hindu families are concerned. In undivided Hindu families it is generally, or rather invariably, the next friend of the minor who becomes his guardian. It is either the mother, brother or uncle who undertakes the trust. These persons are particularly interested in the well-being of the estate for the benefit of the minor, and, as a rule, they do their duty to the satisfaction of all parties. It may certainly happen sometimes that such persons may be dishonestly inclined, and in these cases the Court, on satisfactory proof, has the power to compel them to render accounts or to remove them from the mangement. These remedies, I submit, ought to be sufficient to protect the interests of minors when they are in peril. To put in a stranger as a guardian of a minor in a joint Hindu family would simply be to destroy the family union and thus inflict great injury upon all members of the family. The family is so constituted that, if a foreign element be introduced into it, it will lead to the destruction of the peace, harmony and happiness of all members thereof. It was for these reasons that section 20 of the original Bill has been omitted, and I am glad it was.

"It is my firm belief that the Bill, as revised by the Select Committee, will well protect the interests of minors. There may be individual cases of loss and hardship, but on the whole the advantage, I do not hesitate to say, would far outweigh the disadvantage which may be apprehended."

The Hon'ble Syud Ameer Hossein said:—"As one of the members of the Select Committee who sat on this Bill in the year 1887 as well

NATIONAL ARCHIVES OF INDIA

as in this year, I beg, with Your Excellency's permission to say a few words.

"I congratulate the Hon'ble the Law Member on his bringing the labours of the past four years to a successful close. In my humble judgment the great merit of this Bill lies in the fact that it is of a permissive character. While it gives guardians every inducement to place themselves under the control of the Court, it does not compel them to do so.

"The saving clause contained in section 6 guarantees that in the apppointment of guardians due regard will be paid to the personal laws of Hindus, Muhammadans and other sections of the communities residing in this empire; while section 12, sub-section (2) makes provision for due observance of the customs and manners of this country on the occasion of the production of a respectable female minor before such person as may be appointed by the Court.

"The provision of section 53 will, I hope, sufficiently guard against abuses arising from vexatious suits which may be brought on behalf of minors by persons calling themselves the next friends of the said minors.

"With these remarks I beg to support the Bill."

The motion was put and agreed to.

The Hon'ble Mr. Scoble also moved that the Bill, as amended, be passed.

The motion was put and agreed to.

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## (v). STATEMENT OF OBJECTS AND REASONS.

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This Bill to consolidate and amend the law relating to Guardian and Ward is based on opinions elicited by a reference to Local Governments and High Courts on the subject of certain defects in the law relating to the guardianship of minors, and its object is to provide a law of Guardian and Ward applicable as far as possible to all classes of Her Majesty's subjects in British India.

2. Among the enactments which the Bill wil supersede are Act XL of 1858 and portions of the Madras Code, relating to minors in the Presidencies of Bengal and Madras who are not European British subjects and are not under the superintendence of a Court of Wards; Act XX of 1864, relating to minors in the Presidency of Bombay who are not European British subjects; Act IX of 1861 relating to the

NATIONAL ARCHIVES OF INDIA

custody and guardianship of minors who are not European British subjects; and Act XIII of 1874, relating to the guardianship of European British minors in territories beyond the jurisdiction of the chartered High Courts.

3. The Bill, which follows generally the frame of Act XIII of 1874, is drawn as applicable to all District Courts and High Courts (including the chartered High Courts) and to minors of all creeds and races. But it does not take away any of the powers at present possessed by the chartered High Courts, and it provides that, in the selection of guardians and other matters, regard shall be had to the personal law of the minor. The jurisdiction and authority of Courts of Wards are expressly saved and will not be in any way affected by the proposed law.

4. One effect of the assimilation of the law will be to do away with the rule, which obtains in the Presidencies of Bengal and Bombay, that no person shall be entitled to institute or defend any suit connected with a minor's estate of which he claims the charge until he has obtained a certificate of administration. It is proposed that suits by and against minors shall be regulated by Chapter XXXI of the Code of Civil Procedure, and that, in a Bill which is to be introduced to amend that Code, provision be inserted conferring, among other privileges, on a guardian who has been appointed, or whose title has been declared, under the Guardians and Wards law, a preferential right to be appointed next friend or guardian for the suit.

5. The several sections of the Bill which appear to call for remark will now be noticed in consecutive order.

6. **Section 4, clause (1).**—In connection with section 26, Act XL of 1858, section 30, Act XX of 1864, and section 2, Act XIII of 1874, the question arose whether the age of majority should be dealt with in the Bill. As there was no necessity to deal with it, it was considered expedient to avoid the difficulty of doing so by defining "minor," in the terms of section 11 of the Indian Contract Act, 1872, as a person who has not reached the age of majority according to the law to which he is subject.

7. **Section 4, clause (2).**—"Guardian" has been so defined as to mean any person having the care of the person of a minor or of his property or of both his person and property. The Bill, therefore, relates to guardians generally except where it is expressed to relate to particular classes of guardians.

8. **Section 5.**—This section follows Act XIII of 1874, which, in recognising in certain circumstances the right of a mother to appoint a guardian, was based on the New York Civil Code. The section goes beyond section 47 of the Indian Succession Act and beyond the English

NATIONAL ARCHIVES OF INDIA

law. But under the English law an appointment by a mother is not now wholly ineffectual, and is likely at no distant date to be declared to be valid except in so far as it may interfere with an appointment by the father.

9. **Sections 9 and 43.**—The High Court and District Court will have concurrent jurisdiction, but the High Court may refuse an application with respect to the guardianship of a minor if in its opinion the application would be disposed of more justly or conveniently by a District Court. Where the application is with respect to the guardianship of the person of a minor, it is ordinarily to be made to the Court having jurisdiction in the place where the minor resides, that being the Court which can most effectively discharge the duties incident to the appointment of a guardian to the person of the minor.

10. **Section 11, Sub-section (2).**—The sub-section follows an order made by the High Court of Judicature for the North-Western Provinces with a view to facilitating the discharge by Collectors of their duty of ascertaining and reporting to the Court of Wards from time to time what proprietors may come within the description of disqualified landholders.

11. **Section 14, Sub-section (4).**—The rule laid down in this sub-section is, as explained by Sir Arthur Hobhouse with respect to the corresponding section in Act XIII of 1874, based solely on grounds of convenience.

12. **Section 15, Sub-section (5), and section 17.**—As regards a minor who is a member of an undivided Hindu family, it seems to be generally admitted that it is desirable, as a rule, to leave him to his natural guardians without interference. But such a minor has certain rights in respect of the family property, and those rights are capable of being protected by a guardian. The guardian could not assume the management of the common property, and possibly he would, owing to the constitution of the co-ownership, be debarred from taking directly even a share in the management, and be confined to a mere power of control from without and a right in the last resort to demand a partition. But even this limited authority might in some cases be of great importance.

As regards the view hitherto taken by the Courts on this subject, it has indeed been held by the High Courts at Fort William and Bombay that Acts XL of 1858 and XX of 1864 could not be applied where the minor had no rights except as a member of an undivided Hindu family (I. L. R., 5 Cal., 219 and 3 Bom., 431, and 12 Bom. H. C. Rep., 247). Some doubt has been thrown on this view by the case before the Privy Council reported in I. L. R., 8 Cal., 656 (I. L. R., 6 Bom., 595 and 8 Bom., 396); but in any case it is a view which seems to be based on

NATIONAL ARCHIVES OF INDIA

the peculiar wording of those Acts, which have been construed as contemplating an actual and (perhaps) corporeal taking charge of and management of some tangible property. In other words, these cases merely decide that under the particular Acts a manager cannot be appointed for a minor member of a pure joint family, not that such a manager is a thing inconceivable or impossible (I. L. R., 7 Cal., 369).

As regards the provisions of certain enactments which allow the Court of Wards to take charge only of the estate of a minor who is a sole owner (Act IV, 1872, section 35, Act XVII, 1876, section 161, and Bengal Act IX, 1879, section 7), they are to be accounted for by the fact that these enactments were designed mainly to guard against the risk of loss of revenue from an estate being left without any competent person in charge of it. That it was not considered impossible to take charge of the interest of a minor shareholder is manifest from Madras Regulations V of 1804, section 20, and X of 1831, section 3, and from the circumstance that section 14 of Act XL of 1858 and other similar enactments provide for the Collector taking charge of the share of a co-owner who is still a minor on the estate escaping from the management of the Court of Wards owing to the other co-owners having come of age. The Courts of Wards in the North-Western Provinces (Act XIX of 1873) and Central Provinces (Act XVII of 1885) are not precluded from assuming superintendence of the interest of a disqualified person who is a co-owner in an estate with other persons who are not disqualified.

It may be gathered from the proceedings of the Legislative Council, 1854-55, page 672 *et seq.*, that it was the intention of the framers of Act XL of 1858 that the Civil Court should appoint guardians for minors owning shares in estates, and it would seem that it is only owing to the peculiar wording of the Act, coupled perhaps with a natural disinclination on the part of the Courts to interfere between joint-owners, that that intention has been defeated.

13. **Section 18.**—This section lays down certain general propositions based on the fact that guardianship is a trust, and that the relationship between guardian and ward is one *uberrimæ fidei*, not only while it lasts, but even after it has ceased to exist.

14. **Sections 24 and 25.**—These sections are based on section 18 of the Acts of 1858 and 1864 and the corresponding section of the Act of 1874, on certain provisions in the Code of Lower Canada, and on suggestions received for the amendment of the Acts of 1858 and 1864. They provide that a guardian who has been appointed, and whose title has been declared, by the Court, shall not borrow for his ward, or transfer any part of the principal of his property, without the permission of the Court, and that the Court, before granting its permission, shall satisfy

NATIONAL ARCHIVES OF INDIA

itself that the transaction proposed is either necessary or for the evident advantage of the ward, and, when granting the permission, shall itself record an order setting forth the necessity or advantage and the conditions subject to which it permits the loan to be taken or the transfer to be effected (I. L. R., 5 Cal., 363 and 6 Cal., 161).

These sections will be supplemented by rules made by the High Court under section 44.

15. **Section 28, clause (a), and section 29.**—These provisions are suggested by the case reported at I. L. R., 5 All., 248.

16. **Section 32.**—The rule contained in this section follows from guardianship being a trust. Though the right of survivorship is not acknowledged in England in the case of guardians appointed by the Court of Chancery, yet in practice the survivor or survivors will be re-elected by the Court without a reference. In America there is the right of survivorship among guardians appointed by the Court of Chancery.

17. **Section 33.**—A testamentary guardian may be removed under this section.

18. **Section 41.**—The cases reported at 15 W. R., 492 and 22 W. R., 479 have suggested the specification of the orders from which an appeal shall lie.

19. Acts XL of 1858 and XX of 1864 provide, in sections 27 and 31, respectively, that nothing in those Acts shall authorize the appointment of any person other than a female as the guardian of the person of a female. The cases reported at I. L. R., 10 Cal., 15 and 11 Cal., 574, and the remarks at pages 213-14 of Sayyid Amir Ali's *Personal Law of Muhammadans*, seem to render the re-enactment of the provision inexpedient. Section 15 of the Bill specifies the matters by which the Court is to be guided in appointing a guardian, and one of those matters is the law to which the minor is subject.

20. The provision of Act XX of 1864, that the legal heir of a minor, or the person next in succession to his property, may not be appointed guardian of the person of the minor, has not been repeated. It is considered that the appointment of such persons should not be absolutely prohibited. This was the opinion of the Supreme Council when Act XL of 1858 was about to be enacted (Proceedings of Legislative Council, 1858, pages 576-77), and is the opinion of the Hon'ble Mr. M. Melvill.

21. If the Bill becomes law in its present form, article 10 of schedule I of the Court-fees Act, 1870, which applies only to the Presidencies of Bengal and Bombay, will become obsolete. It has, therefore, been included in the schedule of enactments to be repealed.

NATIONAL ARCHIVES OF INDIA

# THE GUARDIANS AND WARDS ACT, 1890.

## CONTENTS.

### CHAPTER I.

**PRELIMINARY.**


| *Section.* | | *Page.* |
|---|---|---|
| 1 | Title, extent and commencement .. .. .. .. | 2 |
| 2 | Repeal .. .. .. .. .. .. | 3 |
| 3 | Saving of jurisdiction of Courts of Wards and Chartered High Courts .. .. .. .. .. .. | 4 |
| 4 | Definitions .. .. .. .. .. .. | 6 |


### CHAPTER II.

**APPOINTMENT AND DECLARATION OF GUARDIANS.**


| | | |
|---|---|---|
| 5 | Power of parents to appoint in case of European British subjects .. | 9 |
| 6 | Saving of power to appoint in other cases .. .. .. | 10 |
| 7 | Power of the Court to make order as to guardianship .. .. | 12 |
| 8 | Persons entitled to apply for order .. .. .. | 15 |
| 9 | Court having jurisdiction to entertain application .. .. | 15 |
| 10 | Form of application .. .. .. .. .. | 16 |
| 11 | Procedure on admission of application .. .. .. | 19 |
| 12 | Power to make interlocutory order for production of minor and interim protection of person and property .. .. .. | 20 |
| 13 | Hearing of evidence before making of order .. .. .. | 22 |
| 14 | Simultaneous proceedings in different Courts.. .. .. | 23 |
| 15 | Appointment or declaration of several guardians .. .. | 24 |
| 16 | Appointment or declaration of guardian for property beyond jurisdiction of the Court .. .. .. .. .. | 25 |
| 17 | Matters to be considered by the Court in appointing guardian .. | 25 |
| 18 | Appointment or declaration of Collector in virtue of office .. | 38 |
| 19 | Guardian not to be appointed by the Court in certain cases .. | 38 |


### CHAPTER III.

**DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS.**

*General.*


| | | |
|---|---|---|
| 20 | Fiduciary relation of guardian to ward .. .. .. | 39 |
| 21 | Capacity of minors to act as guardians .. .. .. | 41 |
| 22 | Remuneration of guardian .. .. .. .. | 42 |
| 23 | Control of Collector as guardian .. .. .. .. | 42 |


NATIONAL ARCHIVES OF INDIA

*Guardian of the person.*

| Section. | | Page. |
|---|---|---|
| 24 | Duties of guardian of the person .. .. .. .. | 43 |
| 25 | Title of guardian to custody of ward .. .. .. | 45 |
| 26 | Removal of ward from jurisdiction .. .. .. | 46 |

*Guardian of Property.*

| | | |
|---|---|---|
| 27 | Duties of guardian of property .. .. .. .. | 47 |
| 28 | Powers of testamentary guardian .. .. .. .. | 48 |
| 29 | Limitation of powers of guardian of property appointed or declared by the Court .. .. .. .. .. | 48 |
| 30 | Voidability of transfers made in contravention of section 28 or section 29.. .. .. .. .. .. | 49 |
| 31 | Practice with respect to permitting transfers under section 29 .. | 52 |
| 32 | Variation of powers of guardian of property appointed or declared by the Court .. .. .. .. .. | 54 |
| 33 | Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward .. .. .. | 54 |
| 34 | Obligations on guardian of property appointed or declared by the Court .. .. .. .. .. .. | 56 |
| 35 | Suit against guardian where administration-bond was taken .. | 58 |
| 36 | Suit against guardian where administration-bond was not taken .. | 58 |
| 37 | General liability of guardian as trustee .. .. .. | 59 |

*Termination of Guardianship.*

| | | |
|---|---|---|
| 38 | Right of survivorship among joint guardians .. .. .. | 60 |
| 39 | Removal of guardian .. .. .. .. .. | 60 |
| 40 | Discharge of guardian .. .. .. .. .. | 63 |
| 41 | Cessation of authority of guardian.. .. .. .. | 63 |
| 42 | Appointment of successor to guardian dead, discharged or removed.. | 65 |

## CHAPTER IV.

### SUPPLEMENTAL PROVISIONS.

| | | |
|---|---|---|
| 43 | Orders for regulating conduct or proceedings of guardians, and enforcement of those orders .. .. .. .. | 66 |
| 44 | Penalty for removal of ward from jurisdiction .. .. | 67 |
| 45 | Penalty for contumacy .. .. .. .. | 67 |
| 46 | Reports by Collectors and Subordinate Courts .. .. | 69 |
| 47 | Orders appealable .. .. .. .. .. | 70 |
| 48 | Finality of other orders.. .. .. .. .. | 73 |
| 49 | Costs .. .. .. .. .. .. | 73 |
| 50 | Power of High Court to make rules .. .. .. | 74 |
| 51 | Applicability of Act to guardians already appointed by Court .. | 75 |
| 52 | Amendment of Indian Majority Act .. .. .. | 75 |
| 53 | Amendment of Chapter XXXI of the Code of Civil Procedure .. | 76 |
| | THE SCHEDULE.—Enactments repealed .. .. .. | 79 |

NATIONAL ARCHIVES OF INDIA

THE

# GUARDIANS AND WARDS ACT.

## ACT No. VIII OF 1890.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

**(Received the assent of the Governor General on the 21st March, 1890.)**

*An Act to consolidate and amend the law relating to Guardian and Ward.*

WHEREAS it is expedient to consolidate and amend the law relating to guardian and ward; It is hereby enacted as follows:—

**Notes.**

As the preamble shows, the Guardians and Wards Act is a consolidatory enactment repealing various other statutory enactments, either wholly or in part, and purports to collect the statutory law bearing upon the subject of guardians and wards, forming it into a code; and it brings the law more into line with the law as administered in England.

**Legislation respecting the law of guardian and ward.**—The earliest enactment on the subject was Bengal Regulation I of 1800, which authorized Zillah Judges, when there were no testamentary guardians, to nominate guardians to disqualified landholders not subject to the authority of the Court of Wards. But this Regulation, with various others relating to the same subject, was repealed by Act XL of 1858, which provided a machinery for the appointment of managers of the estates and guardians of the persons of minors (not being European British subjects) residing in Bengal outside the limits of the original civil jurisdiction of the High Court of Calcutta.

NATIONAL ARCHIVES OF INDIA

Similar provision was made in the Madras Presidency by Madras Regulations V of 1804, sec. 20, and X of 1831, sec. 3, and in Bombay by Act XX of 1864, which was in terms similar to Act XL of 1858.

All these enactments have been repealed, and the present Act (VIII of 1890), which consolidates the law on the subject of guardians and wards, applies to the whole of British India, and makes one general law for all minors (whether European British subjects or not) except those subject to the jurisdiction of the Court of Wards.

## CHAPTER I.

### PRELIMINARY.

Title, extent and commencement.

**1.** (1) This Act may be called the Guardians and Wards Act, 1890.

(2) It extends to the whole of British India, inclusive of[1] British Baluchistan; and

(3) It shall come into force on the first day of July, 1890.

#### Notes.

**Sub-sec. (2). British India.**—"British India" means all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India.—General Clauses' Act (X of 1897), sec 3 (7). Apparently, any new province acquired would become, on its acquisition, part of British India.[2]

The law of a conquered territory, added to British India, continues in force until altered by the Crown or the Legislature.[3]

The Act applies to the whole of British India, including the Scheduled Districts (see Act XIV of 1874), and, although no notification has been made under that Act, the provisions of the Guardians and Wards Act apply to the Agency Tracts.[4]

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[1] The words "Upper Burma and" have been omitted here, having been repealed by the fifth Schedule to the Burma Laws Act (XIII of 1898).

[2] *Ouseley* v. *Plowden*, Boulnois, 161-2.

[3] *Jalbhai* v. *Manoel*, I. L. R., 19 Bom., 680.

[4] *Chakrapani* v. *Varahalamma*, I. L. R., 18 Mad., 227.

NATIONAL ARCHIVES OF INDIA

**2.** (1) On and from that day the enactments mentioned in the schedule shall be repealed to the extent specified in the third column thereof.

Repeal.

(2) But all proceedings had, certificates granted, allowances assigned, obligations imposed, and applications, appointments, orders and rules made under any of those enactments, shall, so far as may be, be deemed to have been respectively had, granted, assigned, imposed and made under this Act; and

(3) Any enactment or document referring to any of those enactments shall, so far as may be, be construed to refer to this Act or to the corresponding portion thereof.

**Notes.**

**Sub-sec. (2).**—The effect, however, of this sub-section is not to apply the provisions of the Guardians and Wards Act to cases arising under the old Acts relating to guardians and wards, which were repealed by this Act. In *Lala Hurroprosad and Amiruddin* v. *Sheik Basarath*,[1] a guardian who had taken out a certificate under Act XL of 1858 (Guardianship Act) on the 27th of May 1884, executed a mortgage purporting to charge the property of the wards, without having obtained the sanction of the Civil Court as was required under sec. 18 of that Act. In a suit brought by the mortgagee on the mortgage-bond, it was, *inter alia*, contended for the defence that the mortgage having been effected by the guardian who had not obtained the sanction of the Court, it was void and could not be sued upon. It was contended on behalf of the plaintiff that having regard to sec. 30 of the Guardians and Wards Act, he was entitled to sue on it at any time, unless it was avoided by the ward. The High Court held that Act VIII of 1890 had no application to the case inasmuch as the mortgage was executed while the provisions of Act XL of 1858 were in force; and sec. 2 (2) of the Guardians and Wards Act could not have the effect of applying sec. 30 to the transaction. The mortgage was therefore held to be void.

The Act has also no operation upon persons who ceased to be guardians before the passing of the Act.[2]

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[1] 2 C. W. Notes, CXC.
[2] *Vallabdas* v. *Krishnabai*, I. L. R., 17 Bom., 566.

NATIONAL ARCHIVES OF INDIA

Saving of Jurisdiction of Courts of Wards and Chartered High Courts.

**3.** This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by the Governor General in Council or by a Governor or Lieutenant-Governor in Council; and nothing in this Act shall be construed to affect, or in any way derogate from, the jurisdiction or authority of any Court of Wards, or to take away any power possessed by any High Court established under the Statute 24 and 25 Victoria, Chapter 104 (*an Act for establishing High Courts of Judicature in India*).

**Notes.**

"There will be a saving for the powers of the Chartered High Courts under their respective Charters. The Act will apply to those High Courts in the exercise of their original jurisdiction, and I should myself have preferred to enact, as in sec. 150 of the Probate and Administration Act, 1881, that when proceedings are taken in the High Court with respect to the appointment or control of a guardian they should be taken under the new Act and not otherwise. We should thus sweep away a good deal of vague and antiquated law, and substitute for it a set of rules which would, I believe, be quite as easy to work, and certainly more easy to ascertain. However, in deference to what appear to be the views of the High Courts on this point, the Bill will provide that the jurisdiction of the High Courts under their Charters is to be maintained alongside of their jurisdiction under the Act."[1]

The Act thus reserves the powers which the High Courts possess apart from its provisions, and the High Courts have the power, irrespective of the provisions of the Act, of appointing a guardian for the person of an infant or his estate;[2] an applicant can therefore, at his option, apply for the exercise of the powers conferred by this Act or of those conferred by the Royal Charter, or, it seems, he can apply in both jurisdictions.

But though the High Court has powers under the Charter apart from the Guardians and Wards Act, and though it is not in any way bound by the provisions contained therein, still, in exercising such powers, it will not disregard, but as far as possible follow, the principles and procedure laid down in that Act.[3]

[1] Extract from the Speech of the Hon'ble Mr. Ilbert. See *Introduction*.
[2] See *In the matter of the petition of Jairam Luxmon*, I. L. R., 16 Bom., 634; *In re Meakin*, I. L. R., 21 Bom., 137.
[3] *In the matter of Srish Chunder Singh*, I. L. R., 21 Cal., 206.

NATIONAL ARCHIVES OF INDIA

When a competent Court has appointed a guardian under the provisions of the Guardians and Wards Act, the Hight Court cannot, in the exercise of the powers given to it by its Charter, interfere with the powers of that guardian or appoint another guardian in his stead.

**Jurisdiction of the High Court under the Charter Act.**—When an application was made to the Calcutta High Court under sec. 17 of the Letters Patent and sec. 7 of the Guardians and Wards Act to appoint a guardian of the property of an infant who was not an European British subject, and who was living outside the limits of the ordinary original civil jurisdiction of that Court, *Sale*, J., referring to the jurisdiction of the High Court under the Letters Patent said: "I am not aware of an instance in which this Court has exercised that jurisdiction in the case of an infant outside the ordinary original civil jurisdiction of this Court, who is other than an European British subject."[1]

Where a mother residing at Poona, the widow of a deceased European inhabitant of Poona, applied to be appointed guardian of her three minor children (two of whom were residing with her, and the third, a girl of the age of sixteen years, was residing in England), and to have certain payments made to her out of the estate of their deceased father on their account and to have certain powers over their persons given to her, and to have the costs of the application paid out of the shares of the three minor children in the hands of the Administrator-General of Bombay, the High Court of Bombay made the order applied for.[2]

The High Courts acting under the powers contained in their charters can appoint guardians on petition without a suit being filed.[3]

The "**power possessed by any High Court established under the Statute 24 and 25 Victoria, Chap. 104**" is that conferred on it by sec. 17 of the Letters Patent, 1865, which provides as follows:—"And we do further ordain that the said High Court of Judicature at Madras (*or as the case may be*) shall have the like power and authority with respect to the persons and estates of

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[1] *In the matter of Srish Chunder Singh*, I. L. R., 21 Cal., 206.
[2] *In re Meakin*, I. L. R., 21 Bom., 137.
[3] *In the matter of Bittan*, I. L. R., 2 Cal., 357; *In the matter of the petition of Jairam Luxmon*, I. L. R., 16 Bom., 634; *Re Jagannath Ramji*, I. L. R., 19 Bom., 96; See also *In the matter of Srish Chunder Singh*, I. L. R., 21 Cal., 206; *In re Meakin*, I. L. R., 21 Bom., 137.

NATIONAL ARCHIVES OF INDIA

infants, idiots, and lunatics, within the Presidency of Madras, (*or as the case may be*) as that which was vested in the said High Court immediately before the publication of these presents."

**Cases.**—A Court of Wards is not barred from assuming jurisdiction by the fact of a guardian being appointed by a Civil Court.[1]

Definitions.

**4.** In this Act, unless there is something repugnant in the subject or context,—

(1) "minor" means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority:

**Notes.**

Sec. 3 of the Indian Majority Act (IX of 1875) provides:—

"* * * every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall, notwithstanding anything contained in the Indian Succession Act (X of 1865), or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before:

"* * * every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before."

The Indian Majority Act introduces a uniform age of majority in British India. Before the passing of that Act the age of majority was different for different classes of people, and, while in the case of Hindus and Mahomedans, it depended upon their own respective laws, in the case of European British subjects, and in the case of East Indians and Native Christians who had renounced their old laws,[2] the general rule of English law applied.[3]

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[1] *Madhusudan Sing* v. *Collector of Midnapore*, 3 W. R. C. R., 83.
[2] *Abraham* v. *Abraham*, 9 M. I. A., 199.
[3] See Trevelyan on Minors, Chap. I.

NATIONAL ARCHIVES OF INDIA

There was a conflict of decisions under Act XL of 1858 as to whether the age of majority was altered by the making of the order appointing a person to be guardian of the minor, or only by the subsequent taking out of the certificate;[1] but the question does not now arise, as, under the present Act, no certificate is necessary, and therefore the moment the order is made, the age of majority is extended.

If a guardian be once appointed, the disability of infancy will last till the age of 21, whether the original guardian continues to act or not.[2]

**Cases.**—Horoscope is no evidence of minority even when the person making it is dead,[3] though the statements of deceased relatives are admissible in evidence about the age of the minor under sec. 32 of the Indian Evidence Act.[4]

A guardianship certificate is no evidence of minority.[5]

(2) "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property :

**Notes.**

As thus defined guardian includes not only those appointed by a Civil Court, but also natural and testamentary guardians and all persons not wrongfully having the custody of a minor or his property or both. In *Mari Susai* v. *Michael*,[6] the plaintiff brought a suit, under sec. 7, for a declaration that he, as a testamentary guardian, was guardian under Act VIII of 1890. The District Court dismissed the suit On appeal, the High Court held that there was nothing in the Act to prevent the Court from making the declaration that a person appointed by will is the guardian of a minor. "The terms of sec. 7 are general enough to include such guardians, and the proviso to sec. 39 seems ex-

[1] See *Stephen* v. *Stephen*, I. L. R., 8 Cal., 714; on appeal, I. L. R., 9 Cal., 901; *Chunegmul* v. *Brojonath Roy*, I. L. R., 8 Cal., 967; *Girish Chowdhry* v. *Abdul Selim*, I. L. R., 14 Cal., 55; *Harendra Narain* v. *Moran*, I. L. R., 15 Cal., 40; *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285; *Mungniram* v. *Gursahainand*, I. L. R., 17 Cal., 347.

[2] *Rudraprokash* v. *Bholanath*, I. L. R., 12 Cal., 612; see also *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285.

[3] *Satis Chandra* v. *Mohendra Lal*, I. L. R., 17 Cal., 849.

[4] *Dhanmull* v. *Ramchunder Ghose*, I. L. R., 24 Cal., 265.

[5] *Satis Chundra* v. *Mohendra Lal*, I. L. R., 17 Cal., 849; *Gunjra Kuar* v. *Ablakh Pande*, I. L. R., 18 All., 478.

[6] 3 Mad. Law Jour., 182.

NATIONAL ARCHIVES OF INDIA

pressly to contemplate declarations with respect to guardians appointed by will or other instrument."

The definition also removes the doubt expressed in *Duraisami* v. *Sri Duraisami* [1] as to whether the term guardian as used in Act IX of 1861 (repealed by the present Act) included also a guardian of the property of a minor.

(3) "ward" means a minor for whose person or property, or both, there is a guardian:

(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure, and includes a High Court in the exercise of its ordinary original civil jurisdiction:

**Notes.**

District Court is a principal Civil Court of original jurisdiction.—See sec. 2 and the last clause of sec. 4 of the Code of Civil Procedure.

(5) "the Court" means the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; and, where a guardian has been appointed or declared in pursuance of any such application, it means the Court which appointed or declared the guardian, or, in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides:

(6) "Collector" means the chief officer in charge of the revenue-administration of a district, and includes any officer whom the Local Government, by notification in the official Gazette, may, by name or in virtue of his office, appoint to be a Collector in any local area, or with respect to any class of persons, for all or any of the purposes of this Act:

(7) "European British subject" means an European British subject as defined in the Code of Criminal Procedure,[2] 1882, and includes any Christian of European descent: and

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[1] 1 Mad. Law Jour., 537.

[2] *Vide* sec. 3 (1) of the New Code of Criminal Procedure (Act V of 1898), according to which the original reference to the Code of 1882 has been altered to that of 1898.

NATIONAL ARCHIVES OF INDIA

**Notes.**

Sec. 4, cl. (*i*) of the Code of Criminal Procedure, Act V of 1898 (which has repealed the old Code of 1882), defines European British subject as " (i) any subject of Her Majesty born, naturalised or domiciled in the United Kingdom of Great Britain and Ireland or in any of the European, American or Australian Colonies or possessions of Her Majesty or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal; (ii) any child or grand-child of any such person by legitimate descent."

**Any Christian of European descent.**—This would probably be taken to include all Christians who could trace their descent, however far back, from an European.[1]

(8) " prescribed " means prescribed by rules made by the High Court under this Act.

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## CHAPTER II.

### APPOINTMENT AND DECLARATION OF GUARDIANS.

Power of parents to appoint in case of European British subjects.

**5.** (1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing,—

(*a*) by the father of the minor, or,

(*b*) if the father is dead or incapable of acting, by the mother.

(2) Where guardians have been appointed under sub-section (1) by both parents, they shall act jointly.

**Notes.**

This section applies only to European British subjects.

There is nothing in the section to prevent a minor parent from appointing a guardian to his or her minor children.

**Sub-sec. (1), cl. (a).**—With this clause may be compared sec. 47

[1] See *Rollo* v. *Smith*, 1 B. L. R., O. C., 10; *Rainey* v. *Nobocoomar*, 5 C. L. R., 543.



NATIONAL ARCHIVES OF INDIA

of the Indian Succession Act, which provides that "a father, whatever his age may be, may, by will, appoint a guardian or guardians for his child during minority."

**Clause (b). Mother's right to appoint guardian.**—Here the Act follows Act XIII of 1874 (repealed by the present Act), which in recognising in certain circumstances the right of a mother to appoint a guardian, was based on the New York Civil Code.[1]

The right of a mother to appoint a guardian for her minor children is, under the Act, a qualified and limited one, and can be exercised only in cases where the father is dead or incapable of acting.

**Status of a guardian appointed by a parent.**—When a parent exercises the right given to him or her under this section, and appoints a guardian, the Court must recognise such appointment, and a guardian so appointed stands in the same position as a guardian appointed by a Court, and he can only be deprived of the guardianship for the causes which would justify the removal of a guardian appointed by a Court.

**Sub-sec. (2).**—Here the Act follows the provisions of the English Guardianship of Infants Act, 1886 (49 and 50 Vic., c. 27).

**Form of appointment.**—In considering the terms of an appointment, the intention must be looked to, and it is not necessary that any special form of words should be used in appointing a guardian.[2] A direction to executors to manage the property during the minority of the legatee constitutes them guardians of the property.[3]

**Who can be appointed guardian.**—Individuals only can be appointed guardians. Where a testator appointed a trading partnership as a firm, and not as individuals, guardians of his children, the Court refused to recognise such appointment.[4]

Saving of power to appoint in other cases.

**6.** In the case of a minor who is not an European British subject, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his

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[1] Dr. Whitley Stokes. See Introduction: Statement of objects and reasons, § 8.
[2] Simpson on Infants, p. 217.
[3] *In the matter of Srish Chunder Singh*, I.L.R., 21 Cal., 206.
[4] *DeMazar* v. *Pybus*, 4 Ves. Jun., 644; see also *Rowshun Jehan* v. *Collector of Purneah*, 14 W. R. C. R., 295.

NATIONAL ARCHIVES OF INDIA

person or property, or both, which is valid by the law to which the minor is subject.

**Notes.**

Sec. 5 having described the powers of parents to appoint guardians to their minor children in the case of European British subjects, this section deals with the other classes of His Majesty's subjects, and enacts that in the case of a minor, not being an European British subject, nothing in the Act takes away any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject.

A Hindu father, so long as he is not a minor,[1] can by word or writing nominate a guardian for his children;[2] and a Mahomedan father, irrespective of his age, can appoint a guardian for his minor children.[3]

As regards persons who are not governed by Hindu or Mahomedan law, the Indian Succession Act (X of 1865, sec. 47), which applies to wills made by persons other than Hindus, Mahomedans and Buddhists on and since the 1st of January 1866, provides that a father, whatever his age may be, may, by will, appoint a guardian or guardians for his children during minority.

Except in the case of European British subjects (sec. 5 *ante*), a mother[4] has no power to appoint a guardian, though the Court, when appointing a guardian after her death, may take into consideration her appointment.[5]

Parents cannot appoint guardians to their illegitimate children,[6] whatever may be their race.

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[1] It will be seen that sec. 2 of the Hindu Wills Act (XXI of 1870), which applies to the wills of Hindus, Jains, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay, does not extend the provisions of sec. 47 of the Indian Succession Act to these classes of people.

[2] The power of a Hindu father to nominate a guardian for his children is unrestricted, and he may exclude even the mother from the guardianship: *Soobah Doorgah Lal* v. *Neelanund Singh*, 7 W. R. C. R., 74.

[3] Under the Mahomedan Law, not only can a father appoint, by will, a guardian of the property of his minor children (Macnaghten's Mahomedan Law Principles, chap. viii, princ. 4; *Alimodeed Moallem* v. *Syfoora*, 6 W. R. M. R., 125), but, apart from any such specific appointment, the executor of a father's will is entitled to the custody of the property of his minor children.—*Trevelyan.*

[4] It has been held that a Hindu mother has no authority to appoint a guardian by will to her minor adopted son: *Venkiah* v. *Venkata*, I. L. R., 21 Mad., 401; 8 Mad. Law Jour., 112.

[5] *Vide* sec. 17, cl. (2) *post.*

[6] See *Ward* v. *St. Paul*, 2 Brown's Chancery Cases, 583; and *Ex-parte Glover*, 4 Dowl. P. C., 291.

NATIONAL ARCHIVES OF INDIA

Power of the Court to make order as to guardianship.

**7.** (1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(*a*) appointing a guardian of his person or property, or both, or

(*b*) declaring a person to be such a guardian,

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

**Notes.**

Under this section the Court must, before making the order, satisfy itself that it is for the welfare of the minor that an order should be made appointing a guardian, and, of course, also, that the person proposed to be appointed or declared guardian is a fit and proper person to be so appointed or declared.[1]

The application for the appointment or declaration must be a *bonâ-fide* one, and made solely in the interests of the minor; and the Court, therefore, will not allow an application to be made with an indirect object, as for instance, to obtain the Court's opinion with regard to a contested title to property.[2]

**Sub-sec. (3).**—The Court cannot appoint another person guardian in the place of a guardian, who has been appointed by will or other instrument, or who has been appointed or declared by the Court, unless such guardian is dead or has been removed by the Court for any of the causes mentioned in sec. 39 of the Act, or has been discharged by the Court at his own request under sec. 40. Nor would it interfere with the rights of a natural guardian who is not unfit to be appointed a guardian.[3]

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[1] See *Ram Dyal Gooye* v. *Amritlall Khamaroo*, 9 W. R. C. R., 555.
[2] See *Puroma Soonduree* v. *Tara Soonduree*, 9 W. R. C. R., 343.
[3] *In the matter of Saithri*, I. L. R., 16 Bom., 334.

NATIONAL ARCHIVES OF INDIA

This section has been followed in *Shahu* v. *Hapija*,[1] where it was held that when a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under sub-sec. 3 of this section, until it is found, after due investigation[2], that there is no valid will.[3]

Although an order under this section cannot be made where a guardian has already been appointed by will, still, to oust the jurisdiction of the Court, it is necessary that the person so appointing the guardian must have authority to appoint such a guardian. In *Venkiah* v. *Venkata*,[4] where a Hindu mother appointed a guardian by will to her minor adopted son, the Madras High Court said: "The appointment, by this will, of a guardian cannot be held to be such an appointment as comes within sec. 7, cl. 3 of the Guardians and Wards Act; for, a Hindu mother has no authority to make such appointment by will. It was, therefore, the duty of the Court to have enquired under sec. 7 as to the necessity for appointing a guardian, and, if necessary, to have appointed a fit and proper person." Such an appointment may, however, be taken into consideration by the Court.[5]

**Probate by guardian appointed under will.**—It is not essential for a person appointed guardian of a minor under a will to take out probate as a condition precedent to his obtaining a certificate of guardianship under the Guardians and Wards Act.[6]

**Guardianship of share in joint family property.**—Under the repealed Acts, it was decided in several cases that the Court could not give a certificate unless the minor possessed property, of which separate charge could be taken, and which could be separately managed; 'that where he was a member of a joint Hindu family no such certificate could be granted; and that the proper remedy for those who, with a view to his welfare, wished to secure for him the full fruition of his rights in the joint family property was to

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[1] I. L. R., 17 Bom., 560.

[2] The investigation must be full and regular as the procedure under the Act is not intended to be summary: *Shahu* v *Hapija*, I. L. R., 17 Bom., 560.

[3] But the case seems to throw the burden of proving that there was no will on the petitioner; and thus the ordinary rule of evidence that the person who alleges a fact must prove it (secs. 101—103 of the Indian Evidence Act, 1872), seems not to be followed.

[4] I. L. R., 21 Mad., 401; 8 Mad. Law Jour., 112.

[5] See *In re Kaye* L. R., 1 Ch., 387; *Venkiah* v. *Venkata*, I. L. R., 21 Mad. 401; 8 Mad. Law Jour., 112; also, sec. 17, cl. (2) *post*.

[6] *Pathan Ali Khan* v. *Bai Pannibai*, I. L. R., 19 Bom., 832.

NATIONAL ARCHIVE OF INDIA

apply to the other members of the family for a partition; and, if that application failed, to a competent Court for the same purpose."[1] Under the present Act also, it is not competent to a Court to appoint a guardian to the property of a minor when such minor is a member of a joint Hindu family, governed by the Mitakshara law, and has no other property than his share in the joint family estate.[2] But a guardian of the person of such a minor can be appointed.[3]

**Declaration.**—As to what amounts to a "declaring a person to be a guardian," it has been held that an acknowledgment by a District Court that a person is the guardian of another is a declaration of his guardianship within the meaning of sec. 7; and the age of majority in such a case is 21 years and not 18.[4]

**Powers of Guardians appointed by a Civil Court.**—A guardian appointed by the Court derives his powers from the Act; and by his appointment, he loses such powers as he might have possessed before, but which the Act denies to guardians appointed under it.[5]

**Appeal.**—*Vide* sec. 47, cl. (*a*) *post*. Any person who, being a party to proceedings taken under Act XL of 1858, is injuriously affected by an order passed therein is entitled to appeal.[6]

**Cases.**—An application for a certificate under Act XL of 1858, which, if successful, would, in effect, prolong the minority of an infant from 18 to 21, should not be granted when the alleged minor is admittedly on the point of attaining the age of 18, unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity.[7]

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[1] *Gowrah Kooer* v. *Gujadhur Proshad*, I. L. R., 5 Cal., 219; *Hoolash Kooer* v. *Kassee Proshad*, I. L. R., 7 Cal., 369; *Guracharya* v. *Svamiraya Charya*, I. L. R., 3 Bom., 431; *Narasinga Rav* v. *Venkaji Krishna*, I. L. R., 8 Bom., 395; see also cases cited in *Virupakshappa* v. *Nilgangava*, I. L. R., 19 Bom., 309.

[2] *Jhabbu Singh* v. *Ganga Bishan*, I. L. R., 17 All., 529; *Bhandu Prasad* v. *Dhiraji Kuar*, I. L. R., 20 All., 400; *Virupakshappa* v. *Nilgangava*, I. L. R., 19 Bom., 309; *Sham Kuar* v. *Mohananda Sahoy*, I. L. R., 19 Cal., 301.

[3] *Virupakshappa* v. *Nilgangava*, I. L. R., 19 Bom., 309.

[4] *Tiruvengadamier* v. *Periasami*, 9 Mad. Law Jour., 24.

[5] *Shurrut Chunder* v. *Raj Kissen*, 15 B. L. R., 350; see also *Anpurna Bai* v. *Durgapa*, I. L. R, 20 Bom., 150; in *Giraj Baksh* v. *Hamid Ali*, I. L. R., 9 All., 340, it was held that there being no sanction, the guardian was relegated to the powers he would have had, if he had not been appointed by the Court. The High Court of Bengal has, however, declined to follow this case, and the express terms of sec. 29 of the present Act make the question clear.

[6] *Muhamdee* v. *Nazirun*, I. L. R., 6 Cal., 19.

[7] *Ibid.* The same rule will, it is presumed, obtain force under the present Act.

NATIONAL ARCHIVES OF INDIA

Persons entitled to apply for order.

**8.** An order shall not be made under the last foregoing section except on the application of—

(*a*) the person desirous of being, or claiming to be, the guardian of the minor, or

(*b*) any relative or friend of the minor, or

(*c*) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or

(*d*) the Collector having authority with respect to the class to which the minor belongs.

**Notes.**

"**Person claiming to be the guardian**" refers to the person claiming to be the natural guardian, or a guardian appointed under a will or other instrument.

**Clause (c).**—As the section does not specify what property the minor must have in a district before the Collector can apply for an order under the section, it seems that property of any kind, whether moveable or immoveable, is enough to enable him to do so.

**Cases.**—Only persons claiming a right to have charge of property in trust for the minor have a right to make applications under Act XL of 1858; a mere creditor has no *locus standi*,[1] though any person apprehending danger to health or life of a minor may ask the Court's interference.

Court having jurisdiction to entertain application.

**9.** (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court

[1] *Meltoon* v. *Gibbon*, 12 W. R. C. R., 101. See, however, *Chakrapani* v. *Varahalamma*, I. L. R., 18 Mad., 227; see also p. 22 *post*.

NATIONAL ARCHIVES OF INDIA

other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

**Notes.**

**District Court.**—*Vide* sec. 4, cl. (4) *ante*.

**Where the minor ordinarily resides.**—The word residence means not where the minor may be dwelling when the application for the appointment or declaration is made, but the family house where every member usually resides, though circumstances may arise in which it may be taken to mean otherwise.[1]

If the minor has more than one residence, and does not reside in one more than in another, then the application may be made to the Court of the district in which either of such residences is situate; but it is more convenient and proper that the application should be made to the Court of the district in which is situate that one of the residences which the minor is actually inhabiting at the time of the application, as it will be easier for the Court to effectually discharge the duties incident to the appointment of a guardian of the minor's person,[2] and will facilitate the giving, if necessary, of the physical possession of the person of the minor to the guardian appointed.[3]

An order made under this section by a District Court having jurisdiction would apply also to property of the minor outside the limits of the jurisdiction of the Court making the order.

**Sub-sec. (3). The Court may return the application.**—An appeal lies to the High Court from an order made by a District Court under this clause returning an application.[4]

Form of application.

**10.** (1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint, and stating, so far as can be ascertained,—

(*a*) the name, sex, religion, date of birth and ordinary residence of the minor;

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[1] *Sheik Mahomed Hossein* v. *Akbur Hossein*, 17 W. R. C. R., 275.
[2] See *Maganbai Purshotam Das* v. *Vithoba*, 7 B. H. C. R., A. C., 7.
[3] See Introduction: Statement of objects and reasons, § 9.
[4] *Vide* sec. 47, cl. (*b*) *post*.

NATIONAL ARCHIVES OF INDIA

(*b*) where the minor is a female, whether she is married, and, if so, the name and age of her husband;

(*c*) the nature, situation and approximate value of the property, if any, of the minor;

(*d*) the name and residence of the person having the custody or possession of the person or property of the minor;

(*e*) what near relations the minor has, and where they reside;

(*f*) whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;

(*g*) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and, if so, when, to what Court, and with what result;

(*h*) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;

(*i*) where the application is to appoint a guardian, the qualifications of the proposed guardian;

(*j*) where the application is to declare a person to be a guardian, the grounds on which that person claims;

(*k*) the causes which have led to the making of the application; and

(*l*) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it



NATIONAL ARCHIVES OF INDIA

shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses.

**Notes.**

**Verification.**—See secs. 51 and 52 of the Code of Civil Procedure (XIV of 1882).

**Clause (c). Approximate value of the property, if any, of the minor.**—It is necessary that the application should state the whole of the property of the minor, whether lying inside or outside the jurisdiction of the Court to which the application is made, but it should refer merely to the property to which the minor is entitled, or of which the applicant claims charge, and it has nothing to do with the estate of any deceased person through whom the minor succeeds to any property.[1]

The words 'if any' imply that the Court can exercise its power under the Act and appoint a guardian of the person of the minor even in cases where the minor is possessed of no property.[2]

**Clause (e). Near relations.**—On this Dr. Whitley Stokes observes:—"Perhaps the Indian Courts will understand this untechnical phrase to mean the relatives, if any, who would be entitled if the minor died. Compare *Devisme* v. *Mellish* (5 Ves., 529); but consider the phrase, 'nearness of kin,' sec. 17, cl. (2), to which 'near relations' seems to refer."

**Cases.**—Neither Act XX of 1864, nor the Code of Civil Procedure, empowers any Court to appoint any person against his or her will, to be a next friend, guardian *ad litem*, administrator of the estate, or guardian of the person of the minor.[3]

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[1] *See* Trevelyan on Minors: Chap. XI.

[2] Under Act XL of 1858, a guardian of the person of a minor could only be appointed in the case of a certificate to manage the minor's property being granted (see secs. 7 and 11). The older English cases showed that the Court of Chancery could not exercise its jurisdiction except there be property. *See, however, the recent cases of *Barnardo* v. *McHugh* [1891], A. C., 388; *In re McGrath* [1893], 1 ch., 143.—*Trevelyan.*

[3] *Jadow* v. *Chhagan*, I. L. R., 5 Bom., 306; *Babaji* v. *Maruti*, I. L. R., 5 Bom., 310; see also sec. 17, (5) *post.*

NATIONAL ARCHIVES OF INDIA

Procedure on admission of application.

**11.** (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing—

(*a*) to be served in the manner directed in the Code of Civil Procedure on—

(i) the parents of the minor if they are residing in British India,

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and

(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given; and

(*b*) to be posted on some conspicuous part of the court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The Local Government may, by general or special order, require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

NATIONAL ARCHIVES OF INDIA

**Notes.**

The principle laid down under the repealed Act XL of 1858 in *Jugodumba* v. *Mircha*[1] seems applicable to the present Act also, and, therefore, the procedure laid down in this section must be strictly followed, and no guardian can be appointed without the day being fixed and the notices being served; but the notices referred to in the section need not be served in the first instance, as the matter cannot proceed until the Court is satisfied that there is ground for proceeding. When it is so satisfied, it directs what persons are to be served.[2]

**Service of notice of application.**—The manner of service is that prescribed in secs. 72—92 of the Code of Civil Procedure.

**Sub-sec. (1), cl. (a), sub-cl. (iv).**—The Court should ascertain, as far as possible, which of the minor's relations would be likely to assert claims to the guardianship of his person or property, and which would be so far friendly to his interests as to help the Court in the selection of a guardian, and should direct notices to be served on such persons. It is in many cases the safest plan to serve the nearest relations with notice of the application, but the matter is one for the Court to determine according to the circumstances of the case.[3]

Power to make interlocutory order for production of minor and interim protection of person and property.

**12.** (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female, who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise—

(*a*) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his

[1] 17 W. R. C. R., 269.
[2] *Harendra Nath* v. *Brinda Rani*, 2 C. W. Notes, 521, at 524.
[3] See Trevelyan: Chap. XI.

NATIONAL ARCHIVES OF INDIA

being her husband, unless she is already in his custody with the consent of her parents, if any, or

(*b*) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

**Notes.**

This section gives the Court summary powers to pass interlocutory orders for the production of the minor and interim protection of the person and property of the minor. This power is intended to be merely ancillary to the appointment of a guardian, and can only be exercised where an application for the appointment of a guardian is made. It will, therefore, be seen that, except pending the appointment of a guardian, the Court has, under the Act, no summary powers to remove a ward from the custody of his guardian even when the custody of the minor by the guardian is calculated to injure the minor, the remedy in such a case being only to apply for the appointment of a guardian and for an interlocutory order under this section.

An order under this section can be made for the temporary protection of the person of the minor even before the production of the minor, if the Court thinks proper and necessary to do so; in other words, the power is not exercisable only after the production of the minor.[1]

**Sub-sec. (2).**—This refers to *purdanasheen* ladies whose customs do not allow them to appear in public. 'The greatest care should be taken by the Courts in requiring the production of *purdanasheen* ladies, as besides, that they have acquired from the customs of their country, a prejudice against appearing in public, they have from passing their lives in seclusion become timid, and it is, in many cases, cruel to force them to appear in a Court of Justice or before any public officer. There is a good deal of difference in these customs. Some ladies may be satisfied by being allowed to veil their countenances; others may be willing to appear in palanquins, while others would feel outraged by having to make any appearance before a Court, or public officer, and might reasonably

[1] *Harendra Nath* v. *Brinda Rani Dasi*, 2 C. W. Notes, 521.

NATIONAL ARCHIVES OF INDIA

require the Judge, either himself to go, or to send a Commissioner, to interview them, and that with a door intervening, at their own residences. In their anxiety to avoid doing anything, which may interfere with the customs of the country, Judges may occasionally be misled, and may give privileges to women, who by conduct or position, are not entitled to them.'[1] The Court would ordinarily require a minor *purdanasheen* to be produced in Court, as her examination by commission would rarely be satisfactory.

Hearing of evidence before making of order.

**13.** On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of, or in opposition to, the application.

**Notes.**

Although the section is not clear as to what persons should be allowed to be heard in opposition to the application, still, there can be no doubt that it includes all persons who are interested in the minor's welfare, and who therefore have a right to see that a proper person is appointed to administer the minor's property or have charge of his person. Under the Bengal Act XL of 1858, it was held[2] that only persons themselves claiming to be appointed guardians have any *locus standi* to oppose an application for a certificate, and that therefore an outsider, as for instance a creditor of the estate, has no right to appear.[3] But that rule will not, it seems, obtain force under the present Act. The true principle seems to be to leave to the Court to decide in each case what persons should be heard in opposition to the application; and, in the interests of the minor, the Court would, and should, hear any relative who is *bonâ fide* contesting the application.[4]

What 'relatives' are to be included in the enquiry is a matter of discretion in each case; as a general rule, it should at least be shown what persons there are of or within the same degree of relationship as the proposed guardian. The summons should be served on such relatives unless their acquiescence in the appointment of the proposed guardian is otherwise proved, or service on them is dispensed with. Evidence is also required of the fitness of the

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[1] Trevelyan: Chap. XI.
[2] *Kisto Kishore* v. *Issen Chunder*, 15 W. R. C. R., 166.
[3] *Meltoon* v. *Gibbon*, 12 W. R. C. R., 101.
[4] *Chakrapani* v. *Varahalamma*, I. L. R., 18 Mad., 227.

NATIONAL ARCHIVES OF INDIA

proposed guardian, and his willingness to act should be proved by the production of his written consent [1]

**Procedure.**—The procedure before, at and after, the hearing of the application must, as far as may be applicable, be in accordance with the Code of Civil Procedure.[2] The procedure under the Act is not intended to be a summary one.[3]

**Evidence.**—The Court may also call upon the Collector, or upon any Court subordinate to it, for a report on any matter arising in any proceeding under the Act, and treat the report as evidence.[4]

Simultaneous proceedings in different courts.

**14.** (1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

(2) If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case through the Local Government to the Governor General in Council, and the Governor General in Council shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

### Notes.

In *In the matter of Fakuriddin Chowdhry*,[5] the question was raised whether the expression 'the Courts' in this section included the original side of the High Court or not. There, two petitions were presented under the Guardians and Wards Act, asking for the same relief, one to the Calcutta High Court exercising its ordinary original civil jurisdiction, and the other

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[1] See Dan. Ch. Prac., 1119.
[2] See sec. 647 of the Code of Civil Procedure.
[3] *Shahu* v. *Hapija*, I. L. R., 17 Bom., 560.
[4] *Vide* sec. 41 (1) *post*.
[5] I. L. R., 26 Cal., 133.

NATIONAL ARCHIVES OF INDIA

to a District Court. The Calcutta High Court held that that was not a case covered by sec. 14, and that that section was never intended to interfere with the clear right of the High Court on its original side, to deal with the appointment of guardians of a minor's person and property, under the charter; nor that such a Court should be included in that section so as to make it compulsory on that Court to stay the proceedings before itself.

Appointment or declaration of several guardians.

**15.** (1) If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.

(2) On the death of a father, being an European British subject, who has, by will or other instrument to take effect on his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.

(3) On the death of a mother, being an European British subject, who, during the incapacity of the father of her minor child, has, by will or other instrument to take effect on her death, appointed a guardian of the child, the Court may, if the father becomes capable of acting, appoint him to be sole guardian of the child or guardian of the child jointly with the guardian, appointed by the mother, as it thinks fit.

(4) Separate guardians may be appointed or declared of the person and of the property of a minor.

(5) If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

**Notes.**

Though the Court may, if it thinks fit, appoint two or more persons as joint guardians of the person or property of a minor, it cannot make separate appointments to run concurrently.[1]

**Survivorship among joint guardians.**—On the death of one of two or more joint guardians, the guardianship continues to the

[1] *Sham Manna v. Ramdyal Goohoo*, 1 W. R., M. A., 3.

NATIONAL ARCHIVES OF INDIA

survivor or survivors until a further appointment is made by the Court.[1]

**Sub-sec. (5).**—See the provisions of the English Guardianship of Infants Act, 1886.[2]

Appointment or declaration of guardian for property beyond jurisdiction of the Court.

**16.** If the Court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian, accept him as duly appointed or declared and give effect to the order.

**Notes.**

Where a guardian has been appointed by a competent Court, no other Court can appoint a guardian.

Matters to be considered by the Court in appointing guardian.

**17.** (1) In appointing or declaring the guardian of a minor the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but, other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if

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[1] *Vide* sec. 38 *post*.
[2] St. 49 & 50 Vic., cap. 27, sec. 1.

NATIONAL ARCHIVES OF INDIA

the minor is a male of an age to require education and preparation for labour and business, then to the father.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

**Notes.**

**Sub-sec. (1).**—The interest and happiness of the minor is of paramount importance, and, under this section, that must be the main consideration for the Court when appointing or declaring a guardian.

Under the **English common law,** the father of a legitimate child is entitled to the custody of it, though an infant at the breast of its mother, if the Court sees no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom. This common law right has, however, been very much modified by statutes of recent years,[1] though it still remains, as constituting the *primâ facie* right, which can only be over-ridden by exercising the powers under the Acts. A father has also a legal right to control and direct the education and bringing up of his children until they attain the age of majority even if they are wards of Court. But that he can, and may, be deprived of such parental right under justifiable circumstances, is well established by many cases,[2] the grounds for such interference being, (i) that the father has forfeited his rights by gross moral turpitude ;[3] (ii) that he has by his conduct abdicated his paternal authority ;[4] or, (iii) that he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court.[5]

The English authorities thus clearly establish that even as against the *primâ facie* legal right of the father to the custody, and control of the education, of his child, the Courts may interfere, the real object to be considered being the welfare of the child ; and there does not seem any substantial difference in this respect between the law of England and the law of India, except that under the Indian law, as incorporated in the present section, the welfare of the infant must be considered from the standpoint also

[1] See St. 2 & 3 Vic., cap. 54 ; St. 36 & 37 Vic., cap. 12 ; St. 49 & 50 Vic., cap. 27.
[2] See *In re Newton*, L. R. [1896], 1 Ch., 740.
[3] *Wellesley* v. *Duke of Beaufort*, 2 Russ., 1.
[4] *Lyons* v. *Blenkin*, Jacob, 245 ; 23 R. R., 38.
[5] *Re Plomley*, 47 L. T., (N. S.), 283 ; *Rochford* v. *Hackman*, Kay, 308 ; See *In re Agar-Ellis*, 24 Ch. D., 317.

NATIONAL ARCHIVES OF INDIA

of his race and religion. That the welfare of the minor and not the right of the parents is the main consideration is well laid down in a case,[1] decided by *Stanley*, J., where the parents claimed the custody of their infant boy from a missionary. *Stanley*, J., is reported to have said: "I for one would be the last to interfere, and I quite agree with Mr. Gregory (counsel for petitioners), that it requires a strong case to induce a Court to allow any obstacle to be placed between a child and its parent. I asked the little boy if he would like to return to his parents, and the question or suggestion that he should go back evoked the strongest feelings of repulsion and he wept bitterly at the thought. I would be glad to believe that his home, if he returned to it, would be made happier for him in the future than it had been in the past, but at the same time it is incumbent on me to see that the boy is not placed in a position of extreme risk. *I have only to regard his well-being and his interest*, and not the feelings of either the father or the mother in this matter. Now, . . . . . I wish to mention one case in which the law is laid down in a very clear and authoritative way. It lays down the principle that, in regard to the custody of infants, the old Common Law Jurisdiction, which declared that parents had an absolute right to the custody and guardianship of their children was governed to a large extent by the jurisdiction of the Chancery Courts. The Chancery Courts do not recognise the absolute right of a parent to his child, but by virtue of the power communicated to the Chancellor, under the great seal, as *parens patriæ*, he can assume jurisdiction in the matter of all infants, and, if necessary, remove infants from the custody and guardianship of the parents. The case to which I refer is *Queen* v. *Gyngall*.[2] The Court of Appeal, in that case, in affirming the judgment of the Queen's Bench Division laid it down that, although the mother, who was the applicant in that case, had not been guilty of any misconduct to disentitle her to the custody of the child, yet the Court, if satisfied that it was essential for the welfare of the child, could refuse to give the mother custody." Again in *In the matter of Joshy Assam*,[3] *Sale*, J., said: "It was no doubt the practice in the Common Law Courts not to interfere with the rights of parents as to the custody of their children except on very strong grounds; but there is also no doubt that the prac-

[1] *In the matter of Henry Hardy, a minor*, reported in the *Englishman* newspaper of December 9, 1899.
[2] L. R. [1893], 2 Q. B., 232.
[3] I. L. R., 23 Cal., 290, at 296.

NATIONAL ARCHIVES OF INDIA

tice in the Courts of Chancery has been different, and that in accordance with that practice, and in the exercise of a large discretion, the Courts have interfered with the parents' right to the custody of their children, when it was clearly shown that the safety or welfare of the children required such interference. It has been pointed out that the rights and privileges of parents as to the control and custody of their children were to be exercised, not in the interest, and for the benefit, of the parents, but in the interest, and for the benefit, of the children: that is the principle which the Chancery Courts have followed in cases where they have been asked to exercise their powers of interference. The modern doctrine, as regards the principle on which the Courts will interfere, is thus stated in the 2nd Vol. of Seton on Decrees:[1] 'In equity a discretionary power has been exercised to control the fathers' or guardians' legal rights of custody where their capricious exercise would materially interfere with the happiness and welfare of the child, or where such rights have been forfeited by conduct or acquiescence, or where the father has so conducted himself or is placed in such a position as to render it, not merely better for the children, but essential to the safety or to their welfare in some very serious and important respect, that their rights should be superseded or interfered with.'"

**Sub-sec. (2). The Court shall have regard to the sex.**—Under the repealed Acts,[2] no person, other than a female, could be appointed guardian of the person of a female; but there is nothing in the present Act to prevent a male being appointed guardian of the person of a female. When, however, there is a competition between a male and a female, the Court, in determining who is to be appointed guardian of the minor female, must, under this sub-section, consider whether, in the particular case, a female is not the more suitable guardian.

Nor does the section prohibit the appointment, as guardian of the person of a minor, of his legal heir or the person next in succession to his property[3].

**Nearness of kin.**—In *Sohna* v. *Khalak Singh*,[4] decided under the old Act, *Mahmood*, J., said: "It seems to me that, although the

[1] p. 884.
[2] See Act XL of 1858, sec. 27 and Act XX of 1864, sec. 31; also *Fuseehun* v. *Kajo*, I. L. R., 10 Cal., 15; *Bhoocha* v. *Elahi Bux*, I. L. R., 11 Cal., 574; Amir Ali's Personal Law of Mahomedans, pp. 213, 214.
[3] Dr. Whitley Stokes.
[4] I. L. R., 13 All., 78, at p. 87.

NATIONAL ARCHIVES OF INDIA

enactment (Act XL of 1858), is far from being complete so as to indicate the policy of the Legislature in framing the enactment, it contains enough to indicate that the grant of certificate of guardianship should not proceed upon mere questions of relationship, and that the Court is in each case required to consider the circumstances thereof, and to consult the interests of the minor in connection with the appointment of guardians, and issue of certificates under the enactment. It does not necessarily follow that the nearest relative is the best guardian to the minor, and mere propinquity of relationship would not, therefore, entitle the person *ipso facto* to be entitled to hold the certificate under the Act." These observations, though made in a case decided under the repealed Act, do not now lose their force, and the principle contained therein is still applicable to cases arising under the present Act Nearness of kin is of greater importance in appointing a guardian of the person than that of the property; so far as the management of the property is concerned, the character and capacity of the guardian is a matter of greater importance than propinquity of relationship; but when the proposed guardians are of equal fitness, nearness of kin is the matter of next importance.[1] "Each case must be governed by its own circumstances, and much is left to the discretion of the Judge, but the Judge cannot, on bare suspicion, assume that a relative proposed as guardian will defraud a minor;[2] and the mere fact of a relative being a *pardanasheen* does not disentitle her.[3] In every case *the Court must consider the well-being of the minor, and of his estate;* and, in appointing a guardian of his person, must look to his moral, bodily, and intellectual welfare. In one case,[4] where two near relatives were fighting to get hold of the property, and the probability was that the minor would suffer if the property remained in the hands of either, the Court was held to be right in declaring that neither was a fit person. In appointing a guardian of the minor's property, care must be taken to avoid appointing a person who has an interest adverse to that of the minor. 'Nearness of kin' does not necessarily refer only to the natural guardian of the minor and the persons entitled to succeed to his property."[5]

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[1] See *Sohna* v. *Khalak Singh*, I. L. R., 13 All., 78.
[2] *Mahamed Saleh* v. *Government*, W. R., 1864, M. R., 26.
[3] *Kurruppool* v. *Collector of Shahabad*, 20 W. R. C. R., 432.
[4] *Jugodamba* v. *Mircha*, 17 W. R. C., 269.
[5] See Trevelyan: p. 99.

NATIONAL ARCHIVES OF INDIA

**The wishes of a deceased parent.**—These may be expressed either by writing, or by word of mouth, or by conduct. The wishes of the father, if not clearly expressed by him, must be inferred from his conduct.

**Sub-sec. (3).**—There have been in England and in India a great many cases in which the question, whether any and what effect should be given to a minor's own wishes, has been discussed. In this country the contest has generally been between parents and Christian missionaries, and the Indian Courts have expressed varying opinions on the question.[1] But now, after the passing of the Guardians and Wards Act, the Indian authorities are not of much importance, as the question is once for all set at rest by this section; if the minor is old enough to form an intelligent preference, the Court may consider that preference, and leave him to elect where he will go. But if he is not of that age, and is still too young to have a choice, then the Court must make an order for his being placed in the proper custody, and for this purpose, it must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists.

Under this clause, the age of the minor and not the intelligence is the criterion; and, in this respect, the Act seems to follow the English law.[2]

The question, however, as to the age at which the Court should listen to the wishes of the minor is not settled, and the Act is silent on the point. It would seem that the principles that guide English Courts would also apply to India, and the Courts would decline to listen to the wishes of a male minor under sixteen, or of a female minor under fourteen.[3] In *Reg.* v. *Howes*,[4] Lord Chief Justice *Cockburn*, in delivering judgment, said: "The whole question is, at what age a child can be said to arrive at the age of discretion. We wish it to be understood that we wholly repudiate

[1] See *In the matter of Himnauth Bose*, 1 Hyde, 111; *Queen* v. *Vaughan*, 5 B. L. R., 418; *R.* v. *Nesbitt*, Perry's Oriental Cases, 103; *In re Culloor Naraincswamy* (referred to in Mayne's Hindu Law, para. 213); *King* v. *Urilla*, 2 Strange's Notes of Cases, 88; *Reade* v. *Krishna*, I. L. R., 9 Mad., 391; *Sarat Chandra* v. *Forman*, I. L. R., 12 All., 213; *Jwala* v. *Pirbhu*, I. L. R., 14 All., 35.

[2] See *Reg.* v. *Howes*, 2 El. & B., 332; 30 L. J. M. C., 47.

[3] The Indian Penal Code [sec. 361] takes away from minors under these ages any liberty of choice with regard to the custody of their persons. See *In the matter of Saithri*, I. L. R., 16 Bom., 316; *Reg.* v. *Howes*, 2 El. & B., 332; *Mallinson* v. *Mallinson*, L. R., 1 P. & D., 221; *In re Agar-Ellis*, 24 Ch. D., 326; *In re Andrews*, L. R., 8 Q. B., 153; *King* v. *Greenhill*, 4 A & E., 624.

[4] 2 El. & B., 332; 30 L J. M. C., 47.

NATIONAL ARCHIVES OF INDIA

the notion that mental precocity can entitle a female child to withdraw herself from the custody of her father, for that very precocity may be the very reason for its being unadvisable that she should do so; it might very likely lead a young girl into difficulty and danger. We are bound to see that we act upon some general rule as to the age at which a person, although a minor, may be left to the freedom of choice which the law recognises. The legislature have thrown light upon the subject, which may safely guide us; the age of sixteen years is pointed out as the age up to which a child ought to remain under parental control, for it has been held that even the consent of a female child, who has been taken away from her father, is not sufficient to justify those who so take her away. Such a taking her away, even with her own consent, is by the law constituted an offence. We may safely rely for guidance on the light thus thrown upon the subject; and the age of sixteen years may be declared to be the age at which a young female cannot be said to have such a discretion as to be entitled to withdraw herself from the custody of her father, when there is nothing to shew that he will not exercise a proper parental control."

**Sub-sec. (4).**—This clause would apply only to parents of children born in lawful wedlock, and therefore it would not apply to the case of illegitimate children.[1]

**Tender years.**—Tender years must be construed with reference to the subsequent provision as to when a boy should be made over to his father. It is not possible to fix any definite age at which a boy requires education and preparation for labour and business, but it might not be unreasonable to consider that this age would generally be arrived at about the completion of the seventh year. The Custody of Infants Act[2] permitted the Court of Chancery to give the mother the custody of her infant children under seven years of age.[3] Seven is the age fixed by the Indian Legislature as ordinarily the age, when a child's maturity of understanding would prevent him committing crimes,[4] and seven years is the age of nurture[5] according to English law.[6]

[1] The English law regards an illegitimate child as nobody's child.
[2] St. 2 & 3 Vic., cap. 54.
[3] See *In re Taylor*, 4 Ch. D., 157.
[4] A minor under the age of seven years is absolutely free from all responsibility to the Criminal Law, and nothing done by him, while under that age, renders him liable to the penalties imposed by that law. See the Indian Penal Code, sec. 82.
[5] See *Ex-parte Knee*, I B. & P. N. R., 148; *Empress* v. *Pemantle*, I. L. R., 8 Cal., 971.
[6] Trevelyan.

NATIONAL ARCHIVES OF INDIA

**Sub-sec. (5).**—See sec. 10 (3), *ante;* also *Babaji* v. *Maruti*[1] and *Jadow* v. *Chhagan*.[2]

**Wishes of a deceased father with regard to religious education.**—As regards religious education, it is settled law that the wishes of the father must be regarded by the Court and must be enforced, unless there is some strong reason for disregarding them. His wishes, if not clearly expressed by him, must be inferred from his conduct. If the father is dead, it will be naturally inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion, that is, the religion which he professed. This inference is one which the Court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed.[3] "It is the duty of the Court to bring up the child in the religion of the father unless there is sufficient reason for disregarding his wishes."[4]

But the law is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father, regardless of the consequences to themselves; the Court will depart from the rule for sufficient reason, the welfare of the infant being the ultimate guide of the Court.[5]

**Illegitimate Children.**—The mother of an illegitimate child has a natural right to its custody,[6] which will be regarded by the Court; but here again the Court will be guided by a consideration of what is best in the interests of the child.

**Guardianship under Hindu Law.**—'The Hindu Law vests the guardianship of the minor in the sovereign as *parens patriæ*. Necessarily this duty is delegated to the child's relations. Of these the father, and next to him the mother, is his natural guardian. In default of her, or if she is unfit to exercise the trust, his nearest male kinsmen should be appointed, the paternal kindred having

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[1] I. L. R., 5 Bom., 310.
[2] I. L. R., 5 Bom., 306.
[3] *In re McGrath*, L. R. [1893], 1 Ch., 143; *In re Nevin* [1891], 2 Ch., 299.
[4] *In re Newton*, L. R. [1896], 1 Ch., 740.
[5] *Stourton* v. *Stourton*, 8 DeGex, Macnaghten & Gordon, 760.
[6] *Queen* v. *Nash*, 10 Q. B. D., 454.

NATIONAL ARCHIVES OF INDIA

the preference over the maternal.[1] Of course, in an undivided family, governed by Mitakshara law, the management of the whole property, including the minor's share, would be vested in the nearest male, and not in the mother. It would be otherwise where the family was divided.[2] But this would not interfere with her right to the custody of the child itself.[3] . . . . . The husband's relations, if any exist within the degree of a sapinda, are the guardians of a minor widow in preference to her father and his relations.[4] A mother loses her right by a second marriage,[5] and a father loses his right by giving his son in adoption.'[6]

**Illegitimate children under Hindu Law.**—The mother is the natural guardian of an illegitimate child, and a Hindu father has not therefore, as against her, any right to the guardianship of his illegitimate offspring. But where she has allowed the child to be separated from her and brought up by the father, or by persons appointed by him, the Court will not allow her to enforce her rights; especially if the result would be disadvantageous to the child, by depriving it of the advantages of a higher mode of life and education.[7] Her own continued immorality[8] would of itself be a sufficient reason against handing over to her a child which was otherwise properly provided for.[9]

**Right of husband to guardianship of minor wife under Hindu Law.**—After marriage the right of guardianship of the person and property of a female minor devolves upon her husband,[10] if not unfit, even though he be himself a minor.[11] The husband has the right to demand that his wife shall reside in the same house as himself, unless he be bound by a special custom to the contrary or there be special circumstances such as absolve the wife from that duty and her parents or guardians from the duty of surrendering her to

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[1] Manu, viii., § 27; ix., § 146, 190, 191; 3 Dig., 542—544; F. MacN., 25; 1 Stra. H. L., 71; 2 Stra. H. L., 72—75; *Gungama* v. *Chendrappa*, Mad. Dec. of 1859, 100.
[2] *Alimelammal* v. *Arunachellam*, 3 Mad. H. C., 69; *Gowrah Koer* v. *Gujadhur Proshad*, I. L. R., 5 Cal., 219.
[3] *Kooldeep* v *Bajbunsee*, S. D. of 1847, 557.
[4] *Khudiram* v. *Bonwari*, I. L. R., 16 Cal., 584.
[5] *Baee Sheo* v. *Ruttonjee*, Morris, Pt. I, 103.
[6] *Lakshmibai* v. *Shridar*, I. L. R., 3 Bom., 1; Mayne: Hindu Law and Usage, § 211.
[7] *R.* v. *Fletcher*, Perry, O. C., 109; *Mittibhayi* v. *Kottekarati*, Mad. Dec. of 1860, 154; *Lal Das* v. *Nekunjo*, I. L. R., 4 Cal., 374; *Kariyadan Pokkar* v. *Kayat Beeran*, I. L. R., 19 Mad., 461.
[8] *Venkamma* v. *Savitramma*, I. L. R., 12 Mad., 67.
[9] *Vide* Mayne: Hindu Law and Usage, § 217.
[10] *In the matter of the petition of Dhuronidhur Ghose*, I. L. R., 17 Cal., 298.
[11] *See* sec. 21 *post*.



NATIONAL ARCHIVES OF INDIA

her husband.[1] The minority of the wife does not of itself constitute such a ground, and this right of the husband is independent of the question whether she is physically fit to perform the duties of a wife.[2]

**Guardianship for marriage.**—The order of guardianship for marriage under Hindu Law is as follows :—(1) Father, (2) Paternal male relations in order of proximity, (3) Mother, (4) Male maternal relations.[3]

**Guardianship under Mahamedan Law.**—The natural (as opposed to testamentary) guardians of minors are, according to the Mahamedan Law, either *near* or *remote*. Of the former description are fathers and paternal grand-fathers, and their executors and the executors of such executors. Of the latter description are the more distant paternal kindred. Near guardians alone are entitled to the management of the property of the minor.[4] In default of these, the custody and care of the minor's property does not devolve upon the remote guardians, but on the ruling authority.[5] Remote guardians are under no circumstances entitled to the management of the minor's property ;[6] their guardianship extends only to matters connected with the education and marriage of their wards.

**Infant's custody under Mahamedan Law.**—Mothers have the right to the custody of their sons till they attain the age of seven years, and of their daughters until they attain the age of puberty. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow. Her marriage with a *near relation* does not deprive her of the rights of a guardian.[7]

**Illegitimate children under Mahamedan Law.**—The Mahamedan Law does not recognise the right of a putative father to the guardianship of the person or property of his illegitimate child.[8]

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[1] *Suntosh Ram* v. *Gera Pattuck*, 23 W. R. C. R., 22; *Boolchand* v. *Janokee*, 25 W. R. C. R., 386.

[2] *Kateeram* v. *Gendhenee*, 23 W. R. C. R., 178; *Akama* v. *Puttaiya*, 3 Mysore Law Rep., 119. See also Mayne: Hindu Law and Usage, § 211.

[3] *Namasivayam Pillai* v. *Annamai Ammal*, 4 Mad. H. C. R., 339.

[4] *Bhutnath* v. *Ahmed Hosain*, I. L. R., 11 Cal., 417 ; *Sitaram* v. *Amir*, I. L. R., 8 All., 324, at p. 338.

[5] *Bukshan* v. *Maldai*, 3 B. L. R., 423.

[6] *Ibid.*

[7] Macnaghten's Mahamedan Law Principles; Chap. VIII.

[8] *Shahjehan* v. *Munro*, S. D. A., N.-W. P., 39. But the father would be entitled to it if he has acknowledged the paternity under circumstances which legitimate the child according to Mahamedan Law.

NATIONAL ARCHIVES OF INDIA

The right of a mother to the custody of her illegitimate children is co-extensive with, if not greater than, her right to the custody of her legitimate children, and inasmuch as the father and his relations are not recognised, she would probably be held entitled to the guardianship of their persons, if not also of their property, until they arrive at majority.

Failing the mother, it would appear that no relation is entitled, as a matter of right, to the guardianship of either the person or the property of Mahamedan minors of illegitimate birth. It would be for the Court to determine what custody would be for the interest of the minor.[1]

**Right of husband to guardianship of minor wife under Mahamedan law.**—Under the Mahamedan law, a husband has not such an absolute right to the custody of his minor wife as is accorded to Hindu husbands by the Hindu law. Even after the marriage, the mother, or other guardian, is entitled to retain the infant wife until she has attained puberty and is fit to bear the embraces of a husband.[2] After that period has arrived he is entitled to have her made over to him, provided that he has paid the dower due to her. Even before she has attained puberty the law does not consider the custody of a wife by her husband as an unlawful custody,[3] at any rate where the marriage is an irrevocable one. On the other hand, the husband is not obliged to maintain his wife when she is too young for matrimonial intercourse,[4] and his right to the custody of his wife is, in every case, dependent upon her being maintained by him.[5]

**Guardians for marriage under Mahamedan law.**—The father is first entitled to give his child in marriage, and after him the paternal grandfather. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage; and in default of maternal guardians, the Government may supply their place.

**Cases.**—A Hindu father is not deprived of his right to the

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[1] *See* Trevelyan: Chap. VIII.

[2] *Nurkadir* v. *Zuleika*, I. L. R., 11 Cal., 649.

[3] *In the matter of Mahin*, 13 B. L. R., 160. There is a question whether the present Act, sec. 19 has not, by implication, given to a Mahamedan husband a right to the custody of his minor wife even though she may not have attained puberty. The Court would, however, having regard to Mahamedan law, probably treat a husband as unfit to be guardian of the person of his immature wife.—*Trevelyan.*

[4] Baillie's Digest, Pt. I., p. 437; see *Kolashun* v. *Didar Buksh*, 24 W. R. C. R., 44.

[5] Trevelyan: Chap. VIII.

NATIONAL ARCHIVES OF INDIA

custody of his children merely by reason of his conversion to Christianity, *i.e.*, since the passing of Act XXI of 1850.[1]

A minor, the issue of Christian marriage, was removed from the custody and guardianship of her mother and the mother's second husband, who had become Mahamedans and contracted a Mahamedan marriage, while the second husband was already the husband in Christian marriage of a living Christian wife.[2]

The religion of a minor must be presumed to be that of his father.[3]

A paternal grandmother has a preferential right over a step-mother to the guardianship of a minor.[4]

A Hindu goldsmith kept a concubine and had a family by her, and then married and had legitimate issue, but continued to keep the concubine in his house. It was held that this circumstance alone did not justify a Court in refusing him the custody of his legitimate children.[5]

According to Mahamedan law, a mother is entitled (in preference to the maternal uncle, unless appointed guardian or manager by the deceased father) to the guardianship of the property of her minor children and to the custody of their persons.[6]

The duty of a Court towards a penniless child under the care of a legal guardian who is able and willing to maintain and educate the child at his own expense, is to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being Nor can the ties of affection be disregarded.[7]

In appointing a guardian of a minor under Act VIII of 1890, the main question for the Court to determine is what is for the

[1] *Muchoo* v. *Arzoon Sahoo*, 5 W. R. C. R., 235; *Kannahi Ram* v. *Biddyaram*, I. L. R., 1 All., 549.
[2] *Skinner* v. *Orde*, 14 M. I. A., 309.
[3] *Ibid.*
[4] *Maharanee Ram Bunsee* v. *Maharanee Soobh*, 7 W. R. C. R., 321.
[5] *Kalidas* v. *Subbama*, I. L. R., 7 Mad., 29.
[6] *Alimodeed* v. *Syfoora Bibi*, 6 W. R., M. R., 125.
[7] *In re McGrath*, L. R. [1893], 1 Ch., 143.

NATIONAL ARCHIVES OF INDIA

welfare of the minor; in determining this, the Court may take into consideration the nearness of relationship of the applicants as being a circumstance tending to show that the interest of the minor will be better looked after.[1]

Under sec. 17 of the Guardians and Wards Act the Court has to be guided by what, consistently with the law to which the minor is subject, appears under the circumstances to be for his welfare.[2]

Under the Hindu law, as under the English law, the father is *primâ facie* entitled to the custody and control of his infant child, and it is for those who maintain the contrary to show that, under the particular circumstances of the case, he ought to be deprived of such initial parental right; and the Court will deprive the father of his initial right if it appears to be for the welfare of the child to do so, using the term 'welfare' in its widest sense, and looking not only to the question of money and comfort, but to the moral and religious welfare of the child and to the ties of affection.[3]

The father of an infant is *primâ facie* entitled to say in what religion the infant should be brought up, but, at the same time, in a proper case there is jurisdiction in the Court to disregard those wishes. The circumstances must, however, be at least unusual to justify the Court in so acting.[4]

When the circumstances show that the father has abdicated his right, the Court may, having regard to the welfare of the child, deprive the father of his initial right to the custody of the minor and to the control of the minor's religion.[5]

Saithri, a girl fifteen years of age, had, for the last eight years with her mother the petitioner's consent, been boarded and educated first at the American Marathi Mission School and then at the Methodist Zenana Mission School, of which latter school the respondent was the superintendent. The petitioner, during that time, had never contributed anything towards the expenses of her daughter's board and education, and was quite unable to do so, being a servant in receipt of a salary of only 8 annas a month, and with no home of her own. Saithri, in the meantime, had become a Christian and assumed the name of Sarah Hattie Houghton, and would soon be in a position, if allowed to complete her education, as she herself desired to do, to earn her own livelihood

[1] *Musst. Bhikuo Koer* v. *Musst. Chamelia*, 2 C. W. Notes, 191.
[2] *Mokoond Lal* v. *Nabadip Chunder*, 2 C. W. Notes, 379, at p. 381; I. L. R., 25 Cal., 881.
[3] *Ibid.* [4] Ibid. [5] *Ibid.*

NATIONAL ARCHIVES OF INDIA

by teaching. The petitioner now applied for an order on the respondent to show cause why Saithri should not be delivered over to the custody of her mother, the petitioner. It was held that even assuming that Saithri, not being 16 years of age, was too young, according to the authorities, to be able to decide for herself where she would reside, it was the duty of the Court to refuse the present application, the Court not being satisfied that the application was made *bonâ fide* by the petitioner, and the petitioner being a servant, earning only 8 annas a month as wages, a pauper and having no home of her own. It was further held that according to the doctrine governing Courts of Equity in such cases, the petitioner by her conduct during the last eight years had precluded herself from demanding that her child should now be given up to her, to do which would, under the circumstances, be manifestly most detrimental to the welfare of the child itself [1]

The true principle deducible from the authorities by which the Court should be guided in such cases is that the Court is to judge upon the circumstances of each particular case, and the welfare of the infant, irrespective of its age, is the main feature to be regarded.[2]

A boy of 14 and a girl of 16 have a right to choose their own residence.[3]

In Courts of Equity, a discretionary power has always been exercised to control the father's legal rights of custody.[4]

Appointment or declaration of Collector in virtue of office.

**18.** Where a Collector is appointed or declared by the Court in virtue of his office to be guardian of the person or property, or both, of a minor, the order appointing or declaring him shall be deemed to authorise and require the person for the time being holding the office to act as guardian of the minor with respect to his person or property, or both, as the case may be.

Guardian not to be appointed by the Court in certain cases.

**19.** Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

(*a*) of a minor who is a married female and whose

[1] *In the matter of Saithri*, I. L. R., 16 Bom., 307.
[2] *Ibid.* [3] *Ibid.*
[4] *In the matter of Joshy Assam*, I. L. R., 23 Cal., 290.

NATIONAL ARCHIVES OF INDIA

husband is not, in the opinion of the Court, unfit to be guardian of her person, or,

(*b*) subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(*c*) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

**Notes.**

This section protects the rights of husbands and fathers, and declares that no one can be appointed guardian of the *person* of a minor when the husband [cl. (*a*)], or father [cl. (*b*)] is not unfit.

There is a question whether this section has not, by implication, given to a Mahamedan husband a right to the custody of his minor wife even though she may not have attained puberty. The Court would, however, having regard to Mahamedan law, probably treat a husband as unfit to be guardian of the person of his immature wife.[1]

**Cases.**—A 'minor under the jurisdiction of the Court of Wards' means a person of whose estate the Court of Wards has actually assumed the management, not a person of whose estate the Court of Wards might, with the sanction of the Government, take charge.[2]

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## CHAPTER III.

## DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS.

*General.*

Fiduciary relation of guardian to ward.

**20.** (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

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[1] Trevelyan: Chap. VIII; *see* p. 35 *ante*.
[2] *Periasami* v. *Seshadri*, I. L. R., 3 Mad., 11.

NATIONAL ARCHIVES OF INDIA

(2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.

**Notes.**

**Sub-sec. (1).**—The guardian stands in a fiduciary relation to his ward, and except that he is entitled to such salary or remuneration as may be provided by the will or other instrument, if any, by which he was appointed, or which, if he be appointed by a Civil Court or by a Court of Wards, has been allotted to him in pursuance of a statutory power (see sec. 22), he must not make any profit out of his office. Should he make such, he might be required to restore it to his ward with such damages as the ward might have suffered by his wrongdoing.[1]

A guardian being in the position of a trustee[2] has all his responsibilities, but he is not exonerated by his ward's acquiescence in a breach of trust.[3]

For the duties, liabilities and disabilities of trustees, see the Indian Trusts Act (II of 1882), chapters III and V.

Transactions between a guardian and his ward will be watched with the greatest jealousy, and, before upholding them, the Courts will require the clearest proof of good faith and fairness, absence of influence, knowledge by the ward of the facts and of his rights, and benefit to his ward, and wherever there is question as to the good faith of a transaction between a guardian and his ward, the burden of proving the good faith of the transaction will always be on the guardian.[4]

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[1] *See* Trevelyan: p. 128. It seems agreed by all writers that the relation between guardian and ward is one *uberrimæ fidei*, and not only while it lasts, but even after it has ceased to exist. During its existence, the parties are under a general disability to deal with each other. But even after the ward has attained majority, any transaction between them in the settling of their accounts or delivery up of the trust, if to the advantage of the guardian, will be regarded with suspicion, if they have been entered into but a short time after the termination of the relationship, unless ample deliberation on the part of the ward, and the utmost good faith on the part of the guardian, are clearly demonstrated.—*Story's Equity*, § 317.

[2] *Beaufort* v. *Berty*, 1 P. W., 703; *Frederick* v. *Frederick*, 1 P. W., 721; *Matthews* v. *Brise*, 14 Beav., 345.

[3] *Wilkinson* v. *Parry*, 4 Russ., 276; *Adye* v. *Fednutean*, 3 S., 841.

[4] *Vide* Indian Evidence Act, 1872, sec. 111.

NATIONAL ARCHIVES OF INDIA

**Sub-sec. (2).**—This sub-section extends the protection which the law affords to minors against the wrongful exercise of the influence of their guardians over them to transactions between them and their guardians after they have attained the age of majority, but while that influence still lasts or is recent; for though at law the relation may have ceased, an influence, for the most part on the side of the guardian still continuing, equity presumes its operation, and will not permit him to derive an important advantage which, but for that influence the ward would not have given up.[1]

The subject of confidential relation was much considered by Lord Brougham in an elaborate judgment in *Hunter* v. *Atkins*.[2] "There are certain relations," he said, "known to the law, as attorney, guardian, trustee; if a person standing in these relations to client, ward or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation."

Capacity of minors to act as guardians.

**21.** A minor is incompetent to act as guardian of any minor except his own wife or child or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.

### Notes.

The section recognises the rights of a *minor* managing member of an undivided Hindu family to be the guardian, not only of his own wife and children, but the wives and children of the other members of his family.

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[1] See *Gillon* v. *Mitford*, 1 Mad. Notes of Cases, 281.

[2] 3 Myl. & K., 135.



NATIONAL ARCHIVES OF INDIA

**22.** (1) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties.

Remuneration of guardian.

(2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Local Government, by general or special order, directs.

**Notes.**

**Sub-sec. (2).**—When a Collector is appointed guardian, fees will be chargeable for the maintenance of his special establishment as they are chargeable in the case of estates under the superintendence of the Court of Wards.[1]

**Appeal.**—An order passed by a District Court refusing to allow any remuneration to a guardian is not appealable. In *Gangadhar* v. *Shivlingrao*,[2] a Názir of a District Court was appointed guardian of the property of certain minors, but no provision as to his remuneration was made at the time of his appointment. Subsequently he applied for his remuneration on his transfer to another appointment. The Judge passed an order refusing to allow any remuneration on the ground that the accounts had been badly kept, and the estate mismanaged. The Názir appealed against the order, and the High Court, in holding that the order was not appealable, observed: "it was sought to bring the order in the present case within the terms of section 45, which would be an appealable order under section 47. It was argued that the order disallowing the remuneration was virtually one which fined the appellant in the sum of Rs. 1,772-2-7, since that was the amount of remuneration which the appellant was entitled to, and claimed, at 5 per cent. under the general practice. We do not, however, think this argument is sound. The appellant has not been shown to be contumacious and was not fined as such under section 45. The Judge merely exercised the discretion vested in him by section 22, and thought fit to allow him no remuneration. Against that order there is no appeal allowed by the Act."

**23.** A Collector appointed or declared by the Court to be guardian of the person or property, or both, of a minor shall, in all matters

Control of Collector as guardian.

[1] Dr. Whitley Stokes.
[2] I. L. R., 24 Bom., 95.

NATIONAL ARCHIVES OF INDIA

connected with the guardianship of his ward, be subject to the control of the Local Government or of such authority as that Government, by notification in the official Gazette, appoints in this behalf.

**Notes.**

The section provides in a general way that a Collector appointed or declared by a Court to be guardian of a minor, shall in matters connected with the guardianship of his ward, be subject to the control of the Local Government or of such authority as that Government appoints, but the Act nowhere refers to his powers.

*Guardian of the Person.*

**24.** A guardian of the person of a ward is charged with the custody of the ward, and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

Duties of guardian of the person.

**Notes.**

The rights and duties of a guardian of the person of a minor fall naturally under four heads in reference to (i) the custody of, and control over, the infant, (ii) education, (iii) maintenance and advancement, and (iv) marriage.

**(i) Custody and control.**—A guardian has a right to the possession of his ward,[1] and for an order from the Court for his return if he leaves or is removed from his custody. He may exercise a discretion as to the custody and education of his ward,[2] and the Court will not interfere so long as this is properly exercised.[3] A guardian cannot remove the ward from the limits of the jurisdiction of the Court by which he was appointed.[4]

**(ii) Education.**—It is the duty of a guardian of the person of a ward to make proper provision for the education of the ward in a manner suitable to the ward's rank and expectations, and he should also give him a moral and religious education. "Looking to a moral and religious education, as the foundation of all that is valuable here, or to be hoped for hereafter, I cannot put pecuniary

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[1] *In re Andrews*, L. R., 8 Q. B., 153; See Seton on Decrees, pp. 745—754.

[2] *Talbot* v. *Shrewsbury*, 4 Myl. & Cr., 672 at 685.

[3] *Ibid*, 673.

[4] See sec. 26, *post*.

NATIONAL ARCHIVES OF INDIA

considerations in the balance with the imperious duty of taking care that the children shall have a moral and religious education.[1]"

In giving the ward a proper education the guardian would pay the greatest respect to the parent's wishes. "It is needless to observe that the law which permits the father to appoint the guardian of his children will pay the highest respect to the expression of his wishes as to the mode of their education."[2]

**(iii) Maintenance.**—It is the duty of the guardian to see that the infant has a proper maintenance—everything necessary for bringing him up according to his station and expectations, that is to say, the position which he will occupy in life and the fortune which he is to enjoy on his attainment of the age of majority If the guardian of the person of the infant be not also the guardian of his property he must apply to the guardian of the property for the expenses of the maintenance, education, etc., of the infant,[3] and it is the duty of the guardian of the property to supply to the guardian of the person money sufficient for the suitable maintenance, education and advancement of the ward.

**(iv) Marriage.**—Lastly it is the duty of the guardian to prevent disparagement of his ward's person by an unfitting marriage. But a marriage once performed cannot afterwards be invalidated.[4] In *Bai Diwali* v. *Moti Karson*,[5] a Hindu widow who was appointed guardian of the person of her minor daughter, eight or nine years old, married the minor in disobedience of the order of a Civil Court directing her to make over the minor to her paternal uncle for the purpose of getting her married. It was held that the principle of *factum valet* applied, and that neither the disobedience of the Court's order, nor the disregard of the preferable claims of the male relations would invalidate the marriage.

Secs. 24—26 which deal with the duties of a guardian of the person of a minor provide only for the support, health and education and advancement of the minor, and although, besides the

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[1] *Per* Lord *Eldon*, *Wellesley* v. *Beaufort*, 2 Russ., 29.

[2] Lord *Cottenham* in *Campbell* v. *Mackay*, 2 Myl. & Cr., 34; see also *Knott* v. *Cottee*, 2 Ph., 192; *Teynham* v. *Lennard*, 4 Bro. P. C., 302; *In re Kaye*, L. R., 1 Ch., 387.

[3] The guardian (of the property) must also provide for the maintenance of such of the members of the ward's family as according to the customs of the family or race to which the ward belongs, are dependent upon the ward for support. See sec. 34 (*e*), *post*.

[4] *Bai Diwali* v. *Moti Karson*, I. L. R., 22 Bom., 509 See also *Modhoosoodhun* v. *Jadub Chunder*, 3 W. R., C. R., 194; *Brindabun Chundra* v. *Chundra Kurmokar*, I. L. R., 12 Cal., 140; *Khushal Chand* v. *Bai Mani*, I. L. R., 11 Bom., 247; *Gazhi* v. *Sakru*, I. L. R., 19 All., 515; *Mulchand* v. *Bhudea*, I. L. R., 22 Bom., 812.

[5] I. L. R., 22 Bom., 509.

NATIONAL ARCHIVES OF INDIA

specific objects abovenamed, there is a general reference to " all such other matters as the law to which the minor is subject requires," it is doubtful whether the marriage of a minor child at or before 9 years can be regarded as falling within the scope of these general words, especially where the marriage of a minor female terminates (sec. 41) the powers of the guardian of the person.[1]

Title of guardian to custody of ward.

**25.** (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882.[2]

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

**Notes.**

This section lays down one of the summary remedies available to guardians seeking to obtain or recover the custody of their wards.[3]

**'Guardian'** in this section, as in the rest of the Act, means a person having the custody of the minor[4] and includes not only a guardian appointed by the Court, but also a natural or testamentary guardian, and, having regard to the principles upon which the Courts in India and England have acted in the summary disposal of the custody of the minors, would include any person not wrongfully having the custody of the minor.[5]

**Interference with rights of guardians appointed by Court.**— Guardians appointed by the Court are perhaps in a better position

[1] *Per Ranade*, J., *Bai Diwali* v. *Moti Karson*, I. L. R., 22 Bom., 509.

[2] According to the New Code of Criminal Procedure (V of 1898), sec. 3 (1), the original reference to the Code of 1882 has been altered to that of 1898.

[3] For other summary remedies, see (i) the Code of Criminal Procedure, 1898, sec. 491; (ii) the Code of Criminal Procedure, 1898, sec. 552; and (iii) the Indian Divorce Act, 1869, secs. 41—44.

[4] *Vide* sec. 4 (2) *ante*.

[5] Trevelyan: p. 202.

NATIONAL ARCHIVES OF INDIA

than other guardians as regards their rights to the custody and control of their wards, as any interference with their rights in this respect will be treated as a contempt of Court.[1]

**Procedure under the section.**—No special procedure is provided for the hearing of an application under this section. The application would be by petition, and the Court can only make an order after due notice to the person in whose custody the minor is, and after hearing such person, if he wishes to be heard, and such evidence, if any, as he may produce.[2]

**Penalty.**—For penalty for disobeying order under this section, see sec. 45.

**Appeal.**—See sec. 47 (*c*).

**Sub-sec. (2).**—The Code of Criminal Procedure, sec. 100, provides that "if any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

Removal of ward from jurisdiction.

**26.** (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general, and may be defined by the order granting it.

## Notes.

**Appeal.**—An order refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto, is appealable to the High Court.[3]

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[1] See *Wellesley* v. *Wellesley*, 2 R. & M., 639.
[2] See Trevelyan: p. 203.
[3] See sec. 47 (*d*).

NATIONAL ARCHIVES OF INDIA

*Guardian of Property.*

**27.** A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property.

Duties of guardian of property.

**Notes.**

Compare, with this section, the provisions of the Indian Trusts Act, 1882, sec. 15, which provides :—"A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust property."

A guardian of the property of a ward is very much in the position of a trustee, and he is bound to show due care and diligence in all his dealings with the ward's property, and the degree of care and diligence required is that which a man of ordinary prudence would show if he were dealing with his own property. He must manage the property committed to him diligently and faithfully for the benefit of the minor, and must in every respect act, to the best of his judgment, for the minor's interest as if the property were his own.[1]

**Acknowledgment of debt by guardian.**—A guardian appointed by a Court is not ordinarily an agent. He has certain statutory powers in regard to the property under his management and no more. He has therefore not the power to acknowledge a debt so as to bind the minor, and an acknowledgment of the debt by him is not such an acknowledgment under sec. 19 of the Indian Limitation Act, 1877, as would give a new period of limitation against the minor.[2]

[1] Though in the position of a trustee, a guardian's power of management may occasionally be enlarged by necessity.

[2] *Chattu Ram* v. *Bilto Ali*, I. L. R., 26 Cal., 51; *Rannal Singhji* v. *Vadilal*, I. L. R., 20 Bom., 61. But where a mother acted as guardian of a minor (not having been appointed by Court), the Madras High Court following *Chinnaya* v. *Gurunatham*, I. L. R., 5 Mad., 169, held that she had authority to acknowledge a debt on the part of a minor provided that the debt was not barred by limitation at the date of the acknowledgment. *Sobhanadri Appa Rao* v. *Sriramulu*, I. L. R., 17 Mad., 221; *Kailasa Padiachi* v. *Ponnukannu Achi*, I. L. R., 18 Mad., 456; see also *Wajibun* v. *Kadir Buksh*, I. L. R., 13 Cal., 292.

NATIONAL ARCHIVES OF INDIA

Powers of testamentary guardian.

**28.** Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immoveable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

**Notes.**

For control of Collector-guardians, see sec. 23 *ante*.

The powers of a guardian appointed by will or other instrument to mortgage or charge, or transfer by sale, gift or otherwise, immoveable property belonging to his ward is regulated by the instrument appointing him, and is subject to any restrictions which may be contained therein;[1] but if he is declared a guardian under sec. 7, the Court which made the declaration may, notwithstanding such restrictions, permit him by an order in writing, made either at the time of the declaration or at any time thereafter, to dispose of any immoveable property specified in the order in any manner permitted by that order.[2]

When the instrument appointing a guardian does not impose any restrictions, his powers over the property of his ward are those of any other guardian not appointed by the Court.

**Appeal.**—An appeal lies to the High Court from an order made by a District Court under this section, refusing permission to a guardian to do an act referred to in the section.[3] But an order granting permission is not appealable.

Limitation of powers of guardian of property appointed or declared by the Court.

**29.** Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court,—

(*a*) mortgage or charge, or transfer by sale, gift, ex-

[1] For the powers of a manager of the estate of a Hindu minor to charge such estate see *Hanooman Pershad* v. *Babooe Munraj*, 6 M. I. A., 393.

[2] Compare the Probate and Administration Act, 1881, sec. 90 (2).

[3] See sec. 47 (*e*).

NATIONAL ARCHIVES OF INDIA

change or otherwise, any part of the immoveable property of his ward, or

(*b*) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

**Notes.**

This section must be read along with the previous section; sec. 28 deals with the limitation of powers over immoveable property of guardians appointed by will or other instrument; this section deals with the limitation of powers of a guardian (not being a Collector), appointed or declared by a Civil Court (either under this Act or under any of the acts repealed by this Act).[1]

**Previous sanction of Court.**—The Court referred to is the Court which appointed or declared the guardian in pursuance of an application under the Act.[2]

**Appeal.**—See sec. 47 (*e*).

**Cases.**—Where a person was appointed by a District Court to be guardian of the person and property of a minor under Act XX of 1864, and he mortgaged certain properties of the minor with the sanction of a Subordinate Judge's Court obtained under the Code of Civil Procedure, sec. 305, it was held that he, as certified guardian had no power to mortgage the minor's property without the previous permission of the Court which had appointed him to act as guardian, and that the sanction of another Court given under the Code of Civil Procedure, sec. 305, was not sufficient to legalise the mortgage. Such mortgage would have been absolutely void under Act XX of 1864, but is only voidable under sec. 30 of the Guardians and Wards Act at the instance of any other person affected thereby.[3]

Voidability of transfers made in contravention of section 28 or section 29.

**30.** A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

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[1] Compare the Probate and Administration Act, 1881, Sec. 90 (3).

[2] See *Duttaram* v. *Gangaram*, I. L. R., 23 Bom., 287.

[3] *Ibid*; *Sinaiya Pillai* v. *Munisami*, I. L. R., 22 Mad., 289.

NATIONAL ARCHIVES OF INDIA

**Notes.**

Compare the Probate and Administration Act, 1881, Sec. 90 (4).

The section operates only in favour of "any other person affected thereby," *i.e.*, the ward himself or the transferee. The disposal, therefore, cannot be avoided by the guardian who made the transfer.[1] The transfer when it is to be avoided by the ward, can be avoided either by the ward on the attainment of his majority, or during his minority, by any friend of the minor or by some other guardian.[2]

The voidability of transfer made without permission has no reference to the *bonâ fide* conduct of the transferee, and the transfer may therefore be avoided even if the transferee (including mortgagee and lessee) has acted in perfect good faith and paid a fair consideration for the transfer. But if the transfer is avoided and possession is ordered to be restored with mesne profits, it should be made contingent on repayment to the transferee of so much of the purchase money as has been expended for the benefit of the minor or his estate, with interest at a reasonable rate.[3] The ward will not be allowed to avoid a contract or other arrangement which is free from fraud or a like defect, without restoring a party thereto who has acted upon it, to the position which he occupied at the time of the arrangement being made.[4] In *Sinaiya Pillai* v. *Muniswamy*,[5] the Madras High Court observed: a 'mortgage executed by the guardian without sanction is not void; it is only voidable. This is clear from sec. 30 of the Act, which must be read with sec. 29. The minor defendant, through his guardian *ad litem*, desires to avoid the mortgage. He is entitled to do so, but only on condition that he shall restore any benefit which he has received thereunder to the person from whom it was received. This principle is acknowledged in sec. 64 of the Indian Contract Act, in sec. 35 of the Transfer of Property Act, and generally by the Indian Courts as Courts of equity and good conscience.'

**Cases.**—The Court cannot set aside summarily an unsanctioned

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[1] See *Ram Doolary* v. *Thacoor Roy*, I. L. R., 4 Cal., 61; 2 C. L. R., 547; *Manmohinee* v. *Juqobundhoo*, 19 W. R., C. R., 233; see also the Indian Evidence Act, 1872, sec. 115.

[2] *Sheo Pershad* v. *Gangaram*, 5 W. R., C R., 221.

[3] *Girraj Baksh* v. *Hamid Ali*, I. L. R., 9 All., 340; *Nizamudin* v. *Anandi Prasad* I. L. R., 18 All., 373; *Sinaiya Pillai* v. *Munisami*, 22 Mad., 289.

[4] See the Indian Contract Act, 1872, secs. 64 & 65.

[5] I. L. R., 22 Mad. 289; see also *Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B. L. R., 350; *Girraj Baksh* v. *Hamid Ali*, I. L. R., 9 All., 340; *Raj Lakhi Ghose* v. *Debendra Chandra Mojumdar*, I. L. R., 24 Cal., 668.

NATIONAL ARCHIVES OF INDIA

dealing with the minor's property, but should leave the title of the parties to be established in a regular suit.[1]

Although the appointment of a guardian by the Court supersedes the powers of natural guardians, the powers of a natural guardian, in the absence of such appointment, are unaffected by the restrictions which the Act (sec. 29) places upon the powers of guardians appointed by the Court;[2] on this principle it was decided[3] that an assignment of a mortgage by a widow, acting as the natural guardian of her minor son, but who has not obtained a certificate under the old Act (XX of 1864) was not invalid with reference to sec. 18 of that Act, though effected without the sanction of the Court.[4]

A mortgage of a minor's property made by his guardian holding a certificate under Act XL of 1858, without obtaining sanction of the Court as required by section 18 of the Act is absolutely null and void, and section 2 of the Guardians and Wards Act does not give retrospective effect to section 30, which, therefore, does not apply to a mortgage executed before the Act came into operation, so as to destroy its void character and render it merely voidable.[5]

A mortgage by a person holding a Certificate of administration in respect of the estate of a minor under Act XL of 1858, of immoveable property belonging to the minor without the sanction of the Civil Court previously obtained, is void with reference to section 18 of that Act and section 23 of the Indian Contract Act, 1872, even though the mortgage money was advanced to liquidate ancestral debts and to save ancestral property from sale in execution of a decree.[6]

A minor cannot ratify a mortgage of his immoveable property made by his guardian, appointed under Act XL of 1858, without the sanction of the Civil Court, such a mortgage being under section 18 of that Act, void *ab initio*.[7]

A lease for a term of twelve years, but renewable at the purgannah rate, and transferable in its character, granted by a certificated

[1] *Mukrumunissa* v. *Abdul Jubbar*, 17 W. R., C. R., 171.
[2] *Honapa* v. *Mhalpai*, I. L. R., 15 Bom., 259.
[3] *Mani Shankar* v. *Bai Muli*, I. L. R., 12 Bom., 686.
[4] See *Ramchunder Chuckerbutty* v. *Brojonath Moozoomdar*, I. L. R., 4 Cal., 929; confirming *Soondernarain* v. *Bennud Ram*, I. L. R., 4 Cal., 76; See also *Honapa* v. *Mhalpai*, I. L. R., 15 Bom., 259.
[5] *Lala Hurro Prosad* v. *Basaruth Ali*, I. L. R., 25 Cal., 909.
[6] *Chimman Singh* v. *Subran Koer*, I. L. R., 2 All., 902.
[7] *Mauji Ram* v. *Tara Singh*, I. L. R., 3 All., 852.

79168

NATIONAL ARCHIVES OF INDIA

guardian without the authority of the Court is void *ab initio*, and will therefore not avail the lessee, even for the period of five years for which such guardian is at liberty to grant the lease.[1]

A lease granted by a guardian of a minor's property who has obtained a certificate under Act XL of 1858 for a term exceeding five years without the sanction required by section 18 of that Act is invalid.[2]

A minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate.[3]

Debts contracted by the guardian of a minor for a pilgrimage not undertaken in the discharge of an urgent spiritual duty which it was obligatory on him to perform, are not necessaries for which the minor would be held liable.[4]

Practice with respect to permitting transfers under section 29.

**31.** (1) Permission to the guardian to do any of the acts mentioned in section 29 shall not be granted by the Court except in case of necessity or for an evident advantage to the ward.

(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the Court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation and be dated and signed by him.

(3) The Court may in its discretion attach to the permission the following among other conditions, namely:—

(*a*) that a sale shall not be completed without the sanction of the Court;

(*b*) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a

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[1] *Harendra Narain Singh* v. *T. D. Moran*, I. L. R., 15 Cal., 40.
[2] *Ranmal Singhji* v. *Vadilal*, I. L. R., 20 Bom., 61.
[3] *Ibid.* [4] *Ibid.*

NATIONAL ARCHIVES OF INDIA

time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs;

(*c*) that a lease shall not be made in consideration of a premium, or shall be made for such term of years and subject to such rents and covenants as the Court directs;

(*d*) that the whole or any part of the proceeds of the act permitted shall be paid into Court by the guardian, to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs.

(4) Before granting permission to a guardian to do an act mentioned in section 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.

**Notes.**

Before granting the permission, the Court must be satisfied that there is an urgent necessity for granting it, and that the ward would clearly be benefited thereby. The Court would not pass an order, except upon the most careful enquiry and upon the strictest evidence, and in each case it must satisfy itself whether, as a matter of necessity and prudence, it is right that any proposed sale or mortgage should take place.[1] But when permission is granted, the transfer is valid and binding, and an innocent purchaser who takes under the order of the Court, made in the case of a testamentary guardian or of a guardian appointed by the Court, is not bound to look behind that order.[2]

Where the order gives sanction to mortgage it should specify the rate of interest;[3] where it gives sanction to lease it should

[1] See *Sikher Chund* v. *Dulputty*, I. L. R., 5 Cal., 363.

[2] *Ganga Pershad* v. *Maharanee*, I. L. R., 11 Cal., at p. 383; L. R., 12 I. A., at p. 50; *Sikher Chund* v. *Dulputty*, I. L. R., 5 Cal., 363; see also *Zain-ul-Abdin Khan* v. *Mahamud Ashgar Ali*, I. L. R., 10 All., 166; L. R., 15 I. A., 12.

[3] *Ganga Pershad* v. *Maharanee*, I. L. R., 11 Cal., 379; L. R., 12 I. A., 47.

NATIONAL ARCHIVES OF INDIA

specify the terms of the lease, and the rate of rent and the amount of the premium, if any; where it gives sanction to sell, it should specify the amount for which the sale should be allowed. These details should all be carefully investigated by the Court, and the Court should ascertain that the minor is obtaining the greatest possible advantage with regard to each of them out of the transaction.[1]

**Appeal.**—Although, under section 47, cl. (*e*) of the Act, an order of a District Court refusing permission is appealable to the High Court, an order granting permission is not appealable, and cannot be contested by a suit or otherwise;[2] and it is, therefore, the more necessary that the greatest care and caution should be taken in making the order.

**Cases.**—On an application under section 18 of XL of 1858 for leave to deal with the property of a minor, the Civil Court is bound to determine the question whether the proposed mode of dealing with it, would, if sanctioned, be for the benefit of such infant, and the petition should contain all the materials reasonably required to enable the Court to decide that question.[3]

Variation of powers of guardian of property appointed or declared by the Court.

**32.** Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject.

**Notes.**

**Appeal.**—An appeal lies to the High Court from an order defining, restricting or extending the powers of a guardian.[4]

Right of guardian so appointed or declared to apply to the Court for opinion in management of property of ward.

**33.** (1) A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward.

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[1] See Trevelyan: Chap: XVII.
[2] See sec. 48 *post*.
[3] *In the matter of Shrish Chunder Mookhopadhya*, I. L. R., 6 Cal., 161.
[4] See sec. 47 (*f*), *post*.

NATIONAL ARCHIVES OF INDIA

(2) If the Court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

(3) The guardian stating in good faith the facts in the petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.

**Notes.**

With this section may be compared section 34 of the Indian Trusts Act, 1882, which provides that "any trustee may, without instituting a suit, apply by petition to the principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

"A copy of such petition shall be served upon, and the hearing thereof may be attended by such of the persons interested in the application as the Court thinks fit.

"The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

"The costs of every application under this section shall be in the discretion of the Court to which it is made."

The present section, as well as section 34 of the Indian Trusts Act, provides a summary way of obtaining the opinion, advice or direction of Court in any difficulty, and thus avoids what would otherwise be a heavy responsibility on a guardian or trustee to act rightly at his peril; but the Court will, in each case, see if it is a proper case for giving its advice in a summary petition, and will refuse it if it thinks that the question is of such unusual difficulty or importance as to be not proper for disposing of it in a summary way.[1]

[1] *In re Madras Doveton Trust Fund*, I. L. R., 18 Mad., 443.

NATIONAL ARCHIVES OF INDIA

Obligations on guardian of property appointed or declared by the Court.

**34.** Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall,—

(*a*) if so required by the Court, give a bond, as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;

(*b*) if so required by the Court, deliver to the Court, within six months from the date of his appointment or declaration by the Court, or within such other time as the Court directs, a statement of the immoveable property belonging to the ward, of the money and other moveable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward;

(*c*) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs;

(*d*) if so required by the Court, pay into the Court at such time as the Court directs any balance due from him on those accounts, or so much thereof as the Court directs; and

(*e*) apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the Court from time to time directs, and, if the Court directs, the whole or any part of that property.

NATIONAL ARCHIVES OF INDIA

## Notes.

As to the penalty for breach of the obligations contained in the section, see sec. 45 *post*.

As to the remedy on the bond referred to in cl. (*a*), see sec. 35 *post*.

**Surety.**—Except it be for the benefit of the minor, a surety cannot be discharged. He may be able to apply to the Court for protection against the guardian.[1]

**Clause (c.) Power of Court to require guardian to exhibit his accounts.**—The liability of a guardian to exhibit his accounts, under this clause, extends only during the minority of the ward, and a Court has therefore no jurisdiction to make an order under this clause after the ward has become *sui juris*. In *Nabu Bepari* v. *Sheikh Mahomed*,[2] a ward on the attainment of his majority applied to a District Court for an order directing the guardian to hand over to him all his property, and for appointing a Commissioner to examine the accounts and report what was due to him. The District Court, acting under sec. 34, cll. (*c*) and (*d*) made an order in terms of the petition. The High Court, in reversing the order, said: 'The object of section 34 is to give the Court, as representing the interest of the minor, certain summary powers for the protection of the property. As soon as the ward becomes *sui juris* the necessity for the power conferred on the Court by sec. 34 ceases. He can then sue his guardian for an account, and can ratify expenditure or dispense with accounts as he thinks fit. The necessity, therefore, for giving the Court, as the protector of the minor's property, the summary powers created by sec. 34, ceases as soon as the minority ends, and the ward becomes capable of representing and protecting his own interest... There is no clear expression of intention in the Act that the guardian's liability to account is to continue to be enforceable by a summary process against which no appeal lies, after it has become enforceable by the ward in the ordinary process of law. In the absence of such expression of intention we think it must be held that the summary powers of the Court cease when the power of the ward to sue for an account comes into existence.'[3]

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[1] *Bai Somi* v. *Chokshi*, I. L. R., 19 Bom., 245.

[2] 5 C. W. Notes, 207.

[3] See *Doolun Sing* v. *Torul Narain Singh*, 4 W. R. Mis., 3; and *Ram Dyal Gooye* v. *Amritlall Khamaroo*, 9 W. R. C. R., 555.



NATIONAL ARCHIVES OF INDIA

**Clause (e.) Such persons as are dependent on the ward.**—Besides those whom the minor is legally bound to support, *i.e.*, his wife and children, this would include such persons, as it would be, if he were an adult, his duty according to the customs of his family or the dictates of his religion to support.[1]

Suit against guardian where administration-bond was taken.

**35.** Where a guardian appointed or declared by the Court has given a bond duly to account for what he may receive in respect of the property of his ward, the Court may, on application made by petition and on being satisfied that the engagement of the bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the Court, or otherwise as the Court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for the ward, in respect of any breach thereof.

**Notes.**

**Assignment of the bond.**—Without the assignment no person other than the Judge to whom the bond is given, can sue on it.[2] The Judge may assign the bond to the minor on the attainment of his majority.

Suit against guardian where administration-bond was not taken.

**36.** (1) Where a guardian appointed or declared by the Court has not given a bond as aforesaid, any person, with the leave of the Court, may, as next friend, at any time during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian, or, in case of his death, against his representative, for an account of what the guardian has received in respect of the property of the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative, as the case may be.

(2) The provisions of sub-section (1) shall, so far as they relate to a suit against a guardian, be subject to the

[1] Trevelyan: p. 135.

[2] *Amar Nath* v. *Thakur Das*, I. L. R., 5 All., 248.

NATIONAL ARCHIVES OF INDIA

provisions of section 440 of the Code of Civil Procedure as amended by this Act.

**Notes.**

A suit under this section cannot be brought after the death of the minor.[1]

General liability of guardian as trustee.

**37.** Nothing in either of the two last foregoing sections shall be construed to deprive a ward or his representative of any remedy against his guardian, or the representative of the guardian, which, not being expressly provided in either of those sections, any other beneficiary or his representative would have against his trustee or the representative of the trustee.

**Notes.**

As has already been observed, a guardian of the property of a minor is in the position of a trustee towards the *cestui que trust*, and it therefore follows that a minor has, as against his guardian, all the rights which a beneficiary has against his trustee.

Like other guardians, Courts of Wards, and the managers and guardians appointed by them, are responsible as trustees for the property entrusted to their care. But the Government by directing the Courts of Wards to take charge of an estate does not constitute itself a trustee for the rightful owner under Madras Regulation V of 1804.[2]

**Limitation.**—Although a suit against a guardian or his representatives for the purpose of following in his or their hands specific property belonging to the ward, is not barred by any length of time,[3] a suit for an account, *i.e.*, to have an account taken and for payment of the balance to be found due, must be brought within six years from the termination of the guardianship;[4] and a suit to make good out of the general estate of a deceased guardian the loss occasioned by a breach of trust must be brought within three years from the date of the guardian's death; or, if the loss has not then resulted, the date of the loss.[5]

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[1] See *In the matter of Narmadha Bai*, I. L. R., 8 Bom., 14; but the representative of the minor can sue for an account.

[2] *Vizia Rama Razu* v. *Secretary of State*, I. L. R., 5 Mad., 91; on appeal, I. L. R. 8 Mad., 525; L. R., 12 I. A., 120.

[3] Act XV of 1877, sec. 10; *Hurro Coomaree* v. *Tarini Churn*, I. L. R., 8 Cal., 766.

[4] Act XV of 1877, Sch. ii, Art. 120; *Saroda Pershad* v. *Brojonath*, I. L. R., 5 Cal., 910; *Hurro Coomaree* v. *Tarini Churn*, I. L. R., 8 Cal., 766.

[5] Act XV of 1877, Sch. ii, Art. 98.

NATIONAL ARCHIVES OF INDIA

*Termination of Guardianship.*

Right of survivorship among joint guardians.

**38.** On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.

**Notes.**

The rule contained in this section follows from guardianship being a trust. Though the right of survivorship is not acknowledged in England in the case of guardians appointed by the Court, yet in practice the survivor or survivors will be re-elected without a reference.[1]

Removal of guardian.

**39.** The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :—

(*a*) for abuse of his trust;

(*b*) for continued failure to perform the duties of his trust;

(*c*) for incapacity to perform the duties of his trust;

(*d*) for ill-treatment, or neglect to take proper care, of his ward;

(*e*) for contumacious disregard of any provision of this Act or of any order of the Court;

(*f*) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward;

(*g*) for having an interest adverse to the faithful performance of his duties;

(*h*) for ceasing to reside within the local limits of the jurisdiction of the Court;

(*i*) in the case of a guardian of the property, for bankruptcy or insolvency;

[1] Dr. Whitley Stokes.

NATIONAL ARCHIVES OF INDIA

(*j*) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject:

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed—

(*a*) for the cause mentioned in clause (*g*) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or

(*b*) for the cause mentioned in clause (*h*) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

**Notes.**

This section has no application to natural guardians as an order for their removal is unnecessary. When a natural guardian is abusing his trust or otherwise showing himself unfit to act as guardian, any friend of the minor may apply for the appointment of a guardian.

**Person interested.**—This expression means person interested in the minor, and will not, therefore, permit an application by a person seeking to remove a guardian for his own purposes, and against the interests of the ward.

**Guardian appointed by will.**—The Act follows the English Guardianship of Infants Act, 1886, sec. 6, in making a testamentary guardian removeable on the same grounds as a guardian appointed by the Court.[1]

**Other instrument.**—The word 'instrument' in this section should be confined to instruments *ejusdem generis* with a will, and a decree of a Civil Court is not an instrument within the contemplation of the section.[2]

**Clause (a.) Abuse of trust.**—The following cases decided under the old Act (XL of 1858), explain what acts will be regarded as

[1] Dr. Whitley Stokes.
[2] *Bai Harkor* v. *Bai Shangar*, I. L. R., 18 Bom., 375.

NATIONAL ARCHIVES OF INDIA

abuse of trust:—Releasing without adequate consideration a mortgage in the minor's favour, and lending the minor's money without security are abuses of trust.[1]

A certificate was cancelled in a case where the guardian, without sufficient cause and without legal advice, withdrew an appeal to set aside a sale of the estate, and dealt with the auction-purchaser and obtained a *putnee* of a portion in his wife's name.[2]

Acts of waste on the part of a Hindu widow, such as the sale of family jewels belonging to her husband's property, would, if proved, be a ground for withdrawing a certificate granted to her under Act XL of 1858.[3]

**Clause (c.) Incapacity.**—This would include not only physical and mental, but also moral incapacity, and therefore a guardian of the person who has contracted vicious habits, which might contaminate the ward would be liable to be removed.[4]

**Change of religion.**—The question how far a change of religion on the part of a guardian of the person of a minor will affect his right of guardianship has been discussed in various cases, but it now seems to be clear that a mere change of religion will not justify the removal of the guardian.[5] The question in each case will be whether the guardian by reason of the change in his religion, becomes incompetent to provide for the education of his ward in the religion in which he ought to be brought up. In the case, therefore, of a guardian other than the father the Court might consider a person who had changed his religion to one other than that professed by the father of the child, and who would, therefore, be unlikely to do his duty with reference to the religious education of his ward, unfit to be appointed guardian.[6]

**Enquiry before order removing guardian.**—An order removing a guardian cannot be made *ex parte*, but can only be made after a judicial enquiry,[7] held on due notice to the person sought to be removed, and after such person has had an opportunity of being heard, and calling evidence on his behalf. But the Court can in a fit and proper case restrain the guardian from intermeddling with the

[1] *Tusneef Hossein* v. *Sookhoo*, 14 W. R. C. R., 453.
[2] *Pitamber Dey* v. *Ishan Chunder Dutt*, 18 W. R., 169.
[3] *Bhagwanee Kunwar* v. *Parbutty Kunwar*, 2 W. R., Mis., 13.
[4] See Macpherson on Infants, p. 149.
[5] See Act XXI of 1850. *Muchoo* v. *Arzoon Sahoo*, 5 W. R. C. R., 235; Simp. on Infants, p. 131.
[6] See sec. 17 (2), *ante*, under which the Court in appointing a guardian must take into consideration the religion of the minor.
[7] *Sakhawat Ali* v. *Noorjehan*, I. L. R., 10 Cal., 429.

NATIONAL ARCHIVES OF INDIA

property of his ward,[1] or may appoint a receiver to take charge of the property,[2] pending the hearing of the application for removal.[3]

**Appeal.**—An appeal lies to the High Court from an order removing a guardian under this section;[4] but there is no appeal where the Court refuses to remove the guardian.[5]

Discharge of guardian.

**40.** (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

(2) If the Court finds that there is sufficient reason for the application, it shall discharge him, and, if the guardian making the application is the Collector and the Local Government approves of his applying to be discharged, the Court shall in any case discharge him.

**Notes.**

Being in the position of a trustee, a guardian cannot be discharged from his trust until he has fully accounted for his dealings with the property of his ward and until another person has duly taken his place.[6] "A guardian appointed by Court is a trustee and cannot renounce or resign his office, unless he obtains the sanction of the Court, for it would be unreasonable that having once undertaken the duties of the guardian, he should be allowed at his own caprice, to relieve himself of the burden to the probable detriment of his ward."[7]

**Appeal.**—An appeal lies to the High Court from an order of the District Court refusing to discharge a guardian.[8] There is, however, no appeal from an order discharging a guardian.

Cessation of authority of guardian.

**41.** (1) The powers of a guardian of the person cease—

(*a*) by his death, removal or discharge;

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[1] See the Code of Civil Procedure, Act XIV of 1882, secs. 492 and 647; see also sec. 42(1), *post*.

[2] See the Code of Civil Procedure, Act XIV of 1882, secs. 503 and 647.

[3] See Trevelyan, p. 112.

[4] See sec. 47 (*g*), *post*.

[5] *Mohima Chunder Biswas* v. *Tarini Sunker*, I. L. R., 19 Cal., 487; *Pakhwanti* v. *Indra Narain*, I. L. R., 23 Cal., 201; *In re Bai Harkha*, I. L. R., 20 Bom., 667; *Imtiaz-un-nissa* v. *Anwarulla*, I. L. R., 20 All., 433; see p. 71, *post*.

[6] See *Gourmonee* v. *Bamasundaree*, 2 Sev. Rep., note to p. 747; cited in Trevelyan, p. 133; *Kalee Pershad* v. *Poorno Debia*, 15 W. R., 398.

[7] Lewin on Trusts.

[8] Section 47 (*h*).

NATIONAL ARCHIVES OF INDIA

(*b*) by the Court of Wards assuming superintendence of the person of the ward;

(*c*) by the ward ceasing to be a minor;

(*d*) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or,

(*e*) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

(2) The powers of a guardian of the property cease—

(*a*) by his death, removal or discharge;

(*b*) by the Court of Wards assuming superintendence of the property of the ward; or

(*c*) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.

**Notes.**

**Sub-sec. (1), cl. (c) and sub-sec. (2), cl. (c).**—The ward ceases to be a minor on his attaining majority according to the Indian Majority Act, 1875.[1]

[1] See sec. 4 (1), *ante*.

NATIONAL ARCHIVES OF INDIA

**Unfit.**—On this expression, Trevelyan observes:—The word 'unfit' is indefinite. Section 19 to which it apparently refers deals with unfitness in the opinion of the Court. It will be very difficult, in a case where the Court's opinion as to the unfitness has not been required, to determine whether a guardian's powers have ceased or not.

**Sub-sec. (3).**—This sub-section gives the ward a summary remedy against the guardian for compelling him, on the termination of his guardianship, to *deliver up* property or accounts in his possession, and avoids the necessity for a regular suit. It applies only to property and accounts actually in his possession or under his control. He cannot, under this clause, be required to make up accounts, or to explain or vouch them, or to give any information on the subject of his dealings with the property. Nor can the section 'be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of the guardianship.'[1]

An order under this section operates as a proceeding in execution of the order of removal.[2]

**Sub-sec. (4). Fraud.**—See the Indian Contract Act, 1872, sec. 17. The 'Court' referred to in this clause is the Court mentioned in cl. 3, *i.e.*, the Court making the requisition.

**Cases.**—No suit would lie by a ward against the son of his late guardian for rendition of accounts.[3]

Appointment of successor to guardian dead, discharged or removed.

**42.** When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.

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[1] *Nabu Bepari* v. *Sheikh Mahomed*, 5 C. W. Notes, 207; see *ante*, p. 57.

[2] See *Sunraj Kuari* v. *Ambika Prasad*, I. L. R., 6 All., 144.

[3] *Manmothonath Bose* v. *Basanto Kumar*, I. L. R., 22 All., 332.



NATIONAL ARCHIVES OF INDIA

## CHAPTER IV.

### SUPPLEMENTAL PROVISIONS.

Orders for regulating conduct or proceedings of guardians, and enforcement of those orders.

**43.** (1) The Court may, on the application of any person interested or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court.

(2) Where there are more guardians than one of a ward and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit.

(3) Except where it appears that the object of making an order under sub-section (1) or sub-section (2) would be defeated by the delay, the Court shall, before making the order, direct notice of the application therefor or of the intention of the Court to make it, as the case may be, to be given, in a case under sub-section (1), to the guardian or, in a case under sub-section (2), to the guardian who has not made the application.

(4) In case of disobedience to an order made under sub-section (1) or sub-section (2), the order may be enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure in a case under sub-section (1), as if the ward were the plaintiff and the guardian were the defendant or, in a case under sub-section (2), as if the guardian who made the application were the plaintiff and the other guardian were the defendant.

(5) Except in a case under sub-section (2), nothing in this section shall apply to a Collector who is, as such, a guardian.

**Notes.**

The section deals with the powers of the District Courts [sec. 4 (4)], while acting under the Guardians and Wards Act, to regulate the conduct and proceedings of guardians, and an order passed by a District Court [sec. 4 (4)] under this section 'regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order' is appealable to the High Court.[1]

[1] See sec. 47 (*i*).

NATIONAL ARCHIVES OF INDIA

**Injunction.**—It is to be observed that the section does not confer jurisdiction to issue an injunction; it merely provides that when an order under sub-sec. (1) or sub-sec. (2) is disobeyed, it 'may be enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure.'[1]

**Sub-sec. (2).**—In providing for the settlement of differences between joint guardians, the Act follows the English Guardianship of Infants Act, 1886, sec. 3, cl. (3).

**Cases.**—Where an application was made by a guardian to a District Court for regulating the amounts of maintenance already allowed, the District Judge refused the application remarking, "I am of opinion that the estate is being administered wisely and well. I see no reason for reducing the maintenance allowed to the minor's mother or for increasing the allowance made to the minor for maintenance." It was held that the order passed by the District Judge was not a judicial order regulating the conduct or proceedings of a guardian of the estate with which the High Court could deal on appeal.[2]

Penalty for removal of ward from jurisdiction.

**44.** If, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, a guardian appointed or declared by the Court removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of section 26, he shall be liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months.

**Notes.**

An appeal lies to the High Court from an order made by a District Court [sec. 4 (4)] imposing a penalty under this section.[3]

Penalty for contumacy.

**45.** (1) In the following cases, namely—

(*a*) if a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction

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[1] *Abdul Rahiman Sahib* v. *Ganapati*, 10 Mad. Law Jour., 305; I. L. R., 23 Mad., 517; see also *Hurrish Chunder Chowdry* v. *Kali Sunderi Debi*, L. R., 10 I. A., 4 I. L. R., 9 Cal., 482.

[2] *Ghudasama Harbhamji* v. *The Taluqdar Settlement Officer*, 2 Bom. L. R., 617. See sec. 47 (*j*).

NATIONAL ARCHIVES OF INDIA

under section 12, sub-section (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under section 25, sub-section (1), or

(*b*) if a guardian appointed or declared by the Court fails to deliver to the Court, within the time allowed by or under clause (*b*) of section 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (*c*) of that section, or to pay into the Court the balance due from him on those accounts in compliance with a requisition under clause (*d*) of that section, or

(*c*) if a person who has ceased to be a guardian, or the representative of such a person, fails to deliver any property or accounts in compliance with a requisition under section 41, sub-section (3),

the person, guardian, or representative, as the case may be, shall be liable, by order of the Court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which the default continues, and not exceeding five hundred rupees in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement, or to exhibit the accounts, or to pay the balance, or to deliver the property or accounts, as the case may be.

(2) If a person who has been released from detention on giving an undertaking under sub-section (1) fails to carry out the undertaking within the time allowed by the Court, the Court may cause him to be arrested and re-committed to the civil jail.

### Notes.

**Further fine during default.**—The Court cannot make a prospective order that the delinquent shall be fined a certain sum each

NATIONAL ARCHIVES OF INDIA

day until production of the person of the minor. Each day's fine must be imposed after each day's offence.[1]

**Appeal.**—See sec. 47 (*j*).

Reports by Collectors and Subordinate Courts.

**46.** (1) The Court may call upon the Collector, or, upon any Court subordinate to the Court, for a report on any matter arising in any proceeding under this Act and treat the report as evidence.

(2) For the purpose of preparing the report the Collector or the Judge of the subordinate Court, as the case may be, shall make such enquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a Court by the Code of Civil Procedure.

**Notes.**

Although it may have called for and received a report, the Court is bound (see sec. 13, *ante*) to give the parties an opportunity of being heard, and of adducing relevant evidence. While giving weight to the opinion of the Collector or the subordinate Court making the report, it is often necessary to see upon what material such report is based, and to act upon it only where it is based upon legal evidence, and where the parties have had an opportunity of placing their view of the matter before the Collector or the subordinate Court making the report. A report is evidence, but not necessarily of a higher class than other evidence which may be produced. The fact that it has received a report does not absolve the Court from the duty of satisfying itself that the order ought to be made or refused, as the case may be.[2] In *Ganesh Vithal* v. *Kusabai*,[3] an application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for enquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections.

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[1] *In the matter of Sagur Dutt*, 1 B. L. R., O. Cr., 41; *In the matter of Love*, 9 B. L. R., App., 35; *In the matter of the Chairman of the Municipal Commissioners for the Suburbs of Calcutta* v. *Aneesooddeen Meah*, 12 B. L. R., App., 2.

[2] See *Hyder Reza* v. *Collector of Purneah*, 22 W. R. C. R., 490; *Ganesh Vithal* v. *Kusabai*, I. L. R., 23 Bom., 698.

[3] I. L. R., 23 Bom., 698.

NATIONAL ARCHIVES OF INDIA

The whole enquiry was held before, and all the evidence was taken by, the Subordinate Judge; upon the evidence so taken, the District Judge disposed of the application. It was held that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted. *Parsons, J.*, observed, section 46 "does not mean that the whole enquiry should be handed over to a subordinate Judge, and it does not allow of the use by the District Court of evidence taken by the subordinate Court. I think that the irregularity is one that vitiates the whole proceedings, and that the conclusion that the District Judge has come to upon evidence not taken before him, cannot be accepted. The parties have the right to require that the District Judge shall take their evidence and pronounce judgment upon it."

Nor has the Court power to act upon a report made by a ministerial officer or any person other than the Collector or a Court subordinate to it, except in cases where a local investigation is necessary or accounts have to be adjusted.[1]

It is generally desirable to require the party, excepting to a report, to formulate his objections, so that the Court may properly deal with the report by way of appeal.

**Cases.**—Section 46 does not control section 13 so as to authorize the District Judge to dispense with the hearing of evidence by himself, and transfer the whole investigation of material issues of fact to a subordinate Court. Nor does it empower the District Judge to use the evidence taken by the subordinate Court.[2]

Orders appealable.

**47.** An appeal shall lie to the High Court from an order made by a District Court,—

(*a*) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or,

(*b*) under section 9, sub-section (3), returning an application; or,

(*c*) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or,

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[1] See the Code of Civil Procedure, secs. 393 and 394; also Trevelyan: p. 115.

[2] *Ganesh Vithal* v. *Kusabai*, I. L. R., 23 Bom., 698.

NATIONAL ARCHIVES OF INDIA

(*d*) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or,

(*e*) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or,

(*f*) under section 32, defining, restricting or extending the powers of a guardian; or,

(*g*) under section 39, removing a guardian; or,

(*h*) under section 40, refusing to discharge a guardian; or,

(*i*) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order; or,

(*j*) under section 44 or section 45, imposing a penalty.

**Notes.**

This specification of appealable orders is suggested by *Mohendro Nath Mookerjee* v. *Bama Soonduree*[1] and *Chumutkar Mohinee Dossee* v. *Raj Rakhal Mitter*.[2]

**Appeals from the Governor's Agent in Ganjam and Vizagapatam.**—The provisions of the Guardians and Wards Act apply to the Agency Tracts, and the High Court has jurisdiction to set aside orders passed by the Agents to the Governor in the Scheduled Districts of Ganjam and Vizagapatam.[3]

**Clause (e).**—An order granting permission is not appealable, and cannot be contested by suit or otherwise.[4]

**Clause (f).**—But no appeal lies from an order of refusal.

**Clause (g).**—There is no appeal when the Court refuses to remove the guardian.[5]

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[1] 15 W. R. C. R., 493.

[2] 22 W. R. C. R., 479.

[3] See *Chakrapani* v. *Varahalamma*, I. L. R., 18 Mad., 227.

[4] See sec. 48, *post*.

[5] *Mohima Chunder Biswas* v. *Tarini Sunker*, I. L. R., 19 Cal., 487; *Pakhwanti* v. *Indra Narain*, I. L. R., 23 Cal., 201; *In re Bai Harkha*, I. L. R., 20 Bom., 667; *Imtiaz-un-nissa* v. *Anwarulla*, I. L. R., 20 All., 433; see p. 63, *ante*.

NATIONAL ARCHIVES OF INDIA

**Who may appeal.**—Persons who are entitled to appeal are those who are properly parties to the proceedings and are injuriously affected by the orders sought to be appealed against.[1]

Though a person who alleges that she was appointed guardian under a will of the minor's father has a right to appeal against an order appointing another person as guardian, still if she dies pending the appeal, the appeal must abate, and cannot be prosecuted by the representative of such person, as an appointment, as a guardian, under a will is a matter of personal preference and trust, and a claim based upon personal trust cannot survive to a representative.[2]

**Appeal from an order on original side of the High Court.**—Besides the appeals contemplated by sec. 47 of the Act, there is an appeal in the High Court itself from an order made by a single Judge under the Guardians and Wards Act, provided such order be a judgment[3] within the meaning of section 15 of the Letters Patent of 1865 of the High Courts of Bengal, Madras, and Bombay. This right of appeal is not limited to the cases mentioned in section 47 of the Act, and it may be exercised by any person who was properly a party to the proceedings and who is injuriously affected by the order.[4]

**Appeal to the Privy Council.**—An order under the Guardians and Wards Act, like an order under Act XL of 1858, bears no appealable value and cannot be carried to the Privy Council.[5]

**Stay of execution pending appeal.**—The execution of an appealable order made under the Act, may, for sufficient cause, be stayed pending appeal,[6] but the Court will not ordinarily stay execution unless it is satisfied that there will be some injury to the minor or his property by the order being executed, and that the appeal is a *bonâ fide* one and has a reasonable chance of success.

**Cases.**—There is no appeal against an order passed by a District

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[1] See *Mhuhamdee* v. *Nazirun*, I. L. R., 6 Cal., 19; *Meltoon* v. *Gibbon*, 12 W. R. C. R., 101.

[2] *Gangabai* v. *Khasha Bai*, I. L. R., 23 Bom., 719.

[3] Judgment in sec. 15 of the Letters Patent means "a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory." *Justices of the Peace for Calcutta* v. *Oriental Gas Company*, 8 B. L. R., 433; *In the matter of Narrondas Dhanji*, I. L. R., 14 Bom., 555; *In the matter of the Petition of Kally Soondery Dabia*, I. L. R., 6 Cal., 594; *Mohabir Prosad* v. *Adhikari*, I. L. R., 21 Cal., 473; see also *Chappan* v. *Moidin Kutti*, I. L. R., 22 Mad., 68.

[4] See Trevelyan, chap. XIII.

[5] See *Pearee Daye* v. *Hurbans Kooer*, 14 W. R. C. R., 299.

[6] See secs. 545, 546 and 647 of the Code of Civil Procedure.

NATIONAL ARCHIVES OF INDIA

Court refusing to allow remuneration to a guardian,[1] nor is there an appeal from an order refusing to regulate the amounts of maintenance already allowed.[2]

Where in proceedings under Act VIII of 1890, the District Judge purported to issue an attachment and appoint a receiver under sections 492 and 493 of the Code of Civil Procedure, an appeal lies as if the order was really passed under those sections notwithstanding that no appeal is provided for against orders passed under the Act.[3]

Finality of other orders.

**48.** Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise.

**Notes.**

**Review.**—This section does not take away the right to apply for a review, when new and important evidence which, after the exercise of due diligence, was not within the knowledge of the person or could not be produced at the time of the order, has been discovered, or for any other sufficient reason.[4]

**Orders obtained by fraud.**—The section would not also exclude a right to set aside an order obtained by fraud or misrepresentation.[5]

**Res judicata.**—Nor would the section preclude a fresh application,[6] except where the matters in question in the subsequent application are the same as those determinable in the earlier one.

Costs.

**49.** The costs of any proceeding under this Act, including the costs of maintaining a guardian or other person in the civil jail, shall, subject to any rules made by the High Court under this Act, be in the discretion of the Court in which the proceeding is had.

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[1] *Gangadhar* v. *Shivlingrao*, I. L. R., 24 Bom., 95.

[2] *Ghudasama Harbhamji* v. *The Taluqdar Settlement Officer*, 2 Bom. L. R., 617; see p. 67 *ante*.

[3] *Abdul Rahiman Sahib* v. *Ganapati*, 10 Mad. L. Jour., 305; I.L.R., 23 Mad., 517; see also *Hurrish Chunder Chowdry* v. *Kali Sunderi Debi*, L. R., 10 I. A., 4; I. L. R., 9 Cal., 482.

[4] See sec. 623 of the Code of Civil Procedure.

[5] *Sheo Purshun Chobey* v. *Collector of Sarun*; 13 W. R. C. R., 256; *Hameeda Bibee* v. *Noor Bibee*; 9 W. R. C. R., 394.

[6] See *Nehalo* v. *Nawal*, I. L. R., 1 All., 428.



NATIONAL ARCHIVES OF INDIA

**Notes.**

The Court may, in its discretion, either require the applicant or the opposing party to pay costs, and in some cases it may permit costs to be paid out of the minor's estate. But when the Court has made no order, a suit will not lie for the costs of proceedings under the Act.[1]

Power of High Court to make rules.

**50.** (1) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules consistent with this Act—

(*a*) as to matters respecting which, and the time at which, report should be called for from Collectors and subordinate Courts;

(*b*) as to the allowances to be granted to, and the security to be required from, guardians, and the cases in which such allowances should be granted;

(*c*) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in sections 28 and 29;

(*d*) as to the circumstances in which such requisitions as are mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 34 should be made;

(*e*) as to the preservation of statements and accounts delivered and exhibited by guardians;

(*f*) as to the inspection of those statements and accounts by persons interested;

(*g*) as to the custody of money, and securities for money, belonging to wards;

(*h*) as to the securities on which money belonging to wards may be invested;

[1] *Kabir* v. *Mahadu*, I. L. R., 2 Bom., 360; see also *Mahram Das* v. *Aiudhia*, I. L. R., 8 All., 452, at pp. 460—61.

NATIONAL ARCHIVES OF INDIA

(*i*) as to the education of wards for whom guardians, not being Collectors, have been appointed or declared by the Court; and,

(*j*) generally, for the guidance of the Courts in carrying out the purposes of this Act.

(2) Rules under clauses (*a*) and (*i*) of sub-section (1) shall not have effect until they have been approved by the Local Government, nor shall any rule under this section have effect until it has been published in the official Gazette.

**Notes.**

See Appendix C for rules framed under this section.

Applicability of Act to guardians already appointed by Court.

**51.** A guardian appointed by, or holding a certificate of administration from, a Civil Court under any enactment repealed by this Act shall, save as may be prescribed, be subject to the provisions of this Act, and of the rules made under it, as if he had been appointed or declared by the Court under Chapter II.

**Notes.**

The Act, however, has no operation upon persons who ceased to be guardians before the passing of the Act.[1]

Amendment of Indian Majority Act.

**52.** In section 3 of the Indian Majority Act, 1875, for the words "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards," the following shall be substituted, namely,—

"every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age."

[1] *Vallabdas* v. *Krishnabai*, I. L. R., 17 Bom., 566. See p. 3 *ante*.

NATIONAL ARCHIVES OF INDIA

**Notes.**

**Before the minor has attained the age of eighteen years.**—These words were added in accordance with the decision of the Bengal High Court in *Stephen* v. *Stephen*.[1]

Amendment of chapter XXXI of the Code of Civil Procedure.

**53.** Chapter XXXI of the Code of Civil Procedure shall be amended as follows, namely:—

*A*.—To section 440 of the said Code the following shall be added, namely:—

"If a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian except with the leave of the Court granted after notice to such guardian and after hearing any objections which he may desire to make with respect to the institution of the suit, and the Court shall not grant such leave unless it is of opinion that it is for the welfare of the minor that the person proposing to institute the suit in the name of the minor should be permitted to do so."

**Notes.**

**Declared guardian by a competent authority.**—It is sufficient if the guardian has been declared by a competent authority even though the order declaring him guardian has not been formally drawn up.[2]

**Suit.**—This includes any proceedings in the nature of a suit, as for instance, proceedings to enforce an award under the Code of Civil Procedure.[3]

**Leave granted after notice to guardian.**—Under the old law (Acts XL of 1858 and XX of 1864), it was held in some cases that although a formal order was more regular, no formal leave was necessary, but that the leave could be inferred from the admission of the plaint, or from the Court having allowed the continuance

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[1] I. L. R., 8 Cal., 714; on appeal, I. L. R., 9 Cal., 901; there, a minor attained the age of 18 years in the interval between an application for a certificate of administration to his property under sec. 3 of Act XL of 1858, and the issue of the certificate, and signed a promissory note. It was held that the certificate afforded no defence to a suit on the note.

[2] *Mungniram* v. *Gursahainand*, I. L. R., 17 Cal., 347; see p. 7 *ante*.

[3] *Vasudev Vishnu* v. *Narayan Jagannath*, 9 B. H. C. R., 289.

NATIONAL ARCHIVES OF INDIA

of the suit or from other circumstances;[1] under the present Act, the terms of this section show that there must have been a formal adjudication *inter partes* as to the right to institute the suit. In the case of a suit against the guardian, notice to the guardian would not always be necessary, as for instance in a suit under section 35 or section 36 of the Act.[2]

**Cases.**—Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was held that the suit was wrongly brought, having regard to section 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members.[3]

The word 'guardian' in sec. 440 of the Code of Civil Procedure as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court.[4]

*B.*—To section 443 of the said Code the following shall be added, namely :—

"Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor, the Court shall appoint him or one of them, as the case may be, to be the guardian for the suit under this section unless it considers, for reasons to be recorded by it, that some other person ought to be so appointed."

**Notes.**

The section expressly requires the appointment of a guardian *ad litem*, whether or not a general guardian is appointed under the provisions of the Act, although it gives precedence to the appointment of a guardian appointed under the Act.[5]

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[1] See *Bhaba* v. *Secretary of State*, I L. R., 14 Cal., 159; *Purmessur Doss* v. *Bhela*, I. L. R., 9 All., 508; *Aukhil Chunder* v. *Tripurasunduree*, 22 W. R. C. R., 525; *Bonomalle* v. *Hungshessur Roy*, 17 W. R. C. R., 492; *Luchmiput Singh* v. *Amir Alum*, I. L. R., 9 Cal., 176; *Jogi Singh* v. *Kunj Behari Singh*, I L. R., 11 Cal., 509; *Durga Churn* v. *Nilmony Doss*, I. L. R., 10 Cal., 134; *Alim Buksh* v. *Jhalo*, I. L. R., 12 Cal., 48.

[2] See Trevelyan: p. 268.

[3] *Shamkrishna* v. *Ram Das*, I. L. R., 20 All., 162.

[4] *Bai Divali* v. *Hiralal*, I. L. R., 23 Bom., 403.

[5] *Dakeshur Pershad* v. *Rewat Mehton*, I. L. R., 24 Cal., 25.

NATIONAL ARCHIVES OF INDIA

*C.*—After section 446 of the said Code the following shall be added, namely:—

"If the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor."

*D.*—For section 461 of the said Code the following shall be substituted, namely:—

"461. (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor, either—

Receipt by next friend or guardian *ad litem* of property under decree for minor.

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

"(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

*E.*—For section 464 of the said Code as amended by the Civil Procedure Code Amendment Act, 1888, the following shall be substituted, namely:—

"464. Nothing in this chapter applies to a Sovereign Prince or ruling Chief suing or being sued in the name of his State or being sued, by direction of the Governor General in Council or a Local Government, in the name of an agent or in any other name, or shall be construed to affect, or in any way derogate from, the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind."

Princes and Chiefs and wards of Court.

NATIONAL ARCHIVES OF INDIA

## THE SCHEDULE.

## ENACTMENTS REPEALED.

(*See Section* 2.)

| Number and year. | Title or subject. | Extent of repeal. |
|---|---|---|
| | *Acts of the Governor General in Council.* | |
| XIV of 1858 ... | Minors (Madras) ... | The whole. |
| XL of 1858 ... | Minors (Bengal) ... | So much as has not been repealed. |
| IX of 1861 ... | Minors ... ... | The whole. |
| XX of 1864 ... | Minors (Bombay) ... | The whole. |
| XIV of 1869 ... | Bombay Civil Courts Act, 1869. | So much of the last paragraph of section 16 as has not been repealed. |
| VII of 1870 ... | Court-fees Act, 1870 ... | Section 19 H, and article 10 of Schedule I. |
| IV of 1872 ... | Punjab Laws Act, 1872 ... | So far as it relates to Act XL of 1858. |
| XIX of 1873 ... | North-Western Provinces Land-revenue Act, 1873. | Section 258. |
| XIII of 1874 ... | European British Minors Act, 1874. | The whole. |
| XV of 1874 ... | Laws Local Extent Act, 1874. | So far as it relates to any enactment repealed by this Act. |
| XX of 1875 ... | Central Provinces Laws Act, 1875. | So far as it relates to Act XL of 1858. |
| XVIII of 1876 ... | Oudh Laws Act, 1876 ... | So far as it relates to Act XL of 1858. |
| XIII of 1879 ... | Oudh Civil Courts Act, 1869. | Clause (1) of section 25 relating to proceedings under Acts XL of 1858 and IX of 1861. |
| XIV of 1882 ... | Code of Civil Procedure ... | The second paragraph of section 443. |
| XVIII of 1884 ... | Punjab Courts Act, 1884... | So much of section 29 as has not been repealed. |
| XVII of 1885 ... | Central Provinces Government Wards Act, 1885. | Section 5. |

NATIONAL ARCHIVES OF INDIA

## THE SCHEDULE—*continued.*

| Number and year. | Title or subject. | Extent of repeal. |
|---|---|---|
| XII of 1887 ... | Bengal, North-Western Provinces and Assam Civil Courts Act, 1887. | Clause (*b*) of section 23, sub-section (2). |
| XI of 1889 ... | Lower Burma Courts Act, 1889. | The words "to be and" in section 99, sub-section (1), and section 102, so far as it relates to Act XIII of 1874. |
| | *Madras Regulations.* | |
| V of 1804 ... | Court of Wards... ... | Section 20 and so much of sections 21 and 22 as relates to persons and property of minors not subject to the superintendence of the Court of Wards. |
| X of 1831 ... | Minors' Estates ... | Section 3. |
| | *Regulations under the Statute 33 Victoria, Chapter 3.* | |
| IX of 1874 ... | Arakan Hill District Laws. | So far as it relates to Acts XL of 1858 and IX of 1861. |

NATIONAL ARCHIVES OF INDIA

# APPENDIX A.

## ENACTMENTS REPEALED.

### ACT NO. XIV OF 1858.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

**(Received the assent of the Governor General on the 9th April, 1858.)**

*An Act to extend the provisions of Act XXI of* 1855 *in the Presidency of Fort Saint George to Minors not subject to the superintendence of the Court of Wards.*

Preamble.

WHEREAS, by Section XX., of Regulation V., 1804, and Section III., Regulation X., 1831, of the Madras Code, the Zillah Courts, subject to the confirmation of the Sadr Adálat, are authorized and required to appoint guardians to the Minor heirs of property of every description not subject to the jurisdiction of the Court of Wards, and by Clause 9, section XXI. of the former Regulation, the guardians are required to provide for the education of their Wards in a manner suitable to their rank and condition; and whereas, by Act XXI of 1855, better provision has been made for the education of Minors, subject to the superintendence of the Court of Wards, and it is expedient that the same powers which are thereby given to the Collectors and Court of Wards in respect of the Minors under their superintendence should be exercised by the Zillah Courts, subject to the control of the Sadr Adálat, in respect of the Minors for whom they are required to appoint guardians; It is enacted as follows:—

General superintendence and control of the education of male Minor Wards vested in Zillah Judges.

1. The general superintendence and control of the education of every male Minor, for whom a guardian has been or shall be appointed by the Zillah Court, is hereby vested in the Judge of the Zillah Court of the District within whose jurisdiction such Minor's estate is situate; or, if such Minor is possessed of immoveable property within the jurisdiction of more than one Zillah Court, in the Judge of such Court as the Sadr Adálat shall direct.



NATIONAL ARCHIVES OF INDIA

Powers of Zillah Judges.

2. The Judge of the Zillah Court, subject to the control of the Sadr Adálat, is hereby authorized to exercise in respect of such Minor and the guardian of such Minor all the powers and authorities which, by sections II., III., IV., and V., Act XXI of 1855, the Collector of Revenue or the Court of Wards is authorized to exercise in respect of Minors and guardians of Minors whose property is under the management of the Court of Wards.

Right to custody of person of male minor.

3. The right to the custody of the person of the every male Minor, for whom a guardian is appointed by the Judge of the Zillah Court, is hereby vested in the person appointed by the Judge of the Zillah Court, with the confirmation of the Court of Sadr Adálat, either originally or upon the removal of a former guardian, to be the guardian of such Minor.

Appeal from the orders of a Zillah Judge to lie to Sadr Court.

4 All orders and proceedings of a Judge of a Zillah Court under the provisions of this Act shall be subject to the revision of the Court of Sadr Adálat, and every person aggrieved by any such order or proceeding may prefer an appeal therefrom to the Court of Sadr Adálat.

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## ACT NO. XL OF 1858.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

**(Received the assent of the Governor General on the 11th December, 1858.)**

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*An Act for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal.*

Preamble.

WHEREAS it is expedient to make better provision for the care of the persons and property of Minors not brought under the superintendence of the Court of Wards; It is enacted as follows :—

Regulations repealed.

I. Regulation I., 1800, Clause 8, and the six following Clauses of section XXIX., Regulation VIII., 1805, Section V., Regulation XVII., 1805, and so much of Sections II., and III., Regulation V, 1799, and of Clauses 2 and 3, Section XVI., Regulation III., 1803, as restrict the interference of the Civil Courts in cases of inheritance by Minors, are repealed.

(This section was repealed by Act XIV of 1870).

II. Except in the case of proprietors of estates paying Revenue to

NATIONAL ARCHIVES OF INDIA

Persons and property of Minors not under the protection of the Court of Wards shall be subject to jurisdiction of Civil Court.

Government who have been or shall be taken under the protection of the Court of Wards, the care of the persons of all Minors (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil Court.

What persons claiming to have charge of property in trust for a Minor may apply for Certificate of administration.

No person competent to institute or defend a suit without such Certificate.

Proviso.

III. Every person who shall claim a right to have charge of property in trust for a Minor under a Will or Deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a Certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such Certificate. Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a Minor to institute or defend a suit on his behalf, although a Certificate of administration has not been granted to such relative.

Who may apply to Court to appoint a person to take charge of the property, &c., of a Minor.

IV. Any relative or friend of a Minor in respect of whose property such Certificate has not been granted, or, if the property consist in whole or in part of land or any interest in land, the Collector of the District, may apply to the Civil Court to appoint a fit person to take charge of the property and person of such Minor.

To what Court application to be made if property be situate in more than one District.

V. If the property be situate in more than one District, any such application as aforesaid shall be made to the Civil Court of the District in which the Minor has his residence.

Summary enquiry to be made by Court on application.

Proviso.

VI. When application shall have been made to the Civil Court either by a person claiming a right to have charge of the property of a Minor, or by any relative or friend of a Minor, or by the Collector, the Court shall issue notice of the application and fix a day for hearing the same. On the day so fixed, or as soon after as may be convenient, the Court shall enquire summarily into the circumstances and pass orders in the case. Provided always that it shall be competent to the Civil Court to direct any Court subordinate to it to make such enquiry and report the result.

Certificate of administration to whom to be granted.

VII. If it shall appear that any person claiming a right to have charge of the property of a Minor is entitled to such right by virtue of a Will or Deed, and is willing to undertake the trust, the Court shall grant a Certificate of administration to such person.

NATIONAL ARCHIVES OF INDIA

If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the Minor who is willing and fit to be entrusted with the charge of his property, the Court may grant a Certificate to such relative. The Court may also, if it think fit (unless a Guardian have been appointed by the father), appoint such person as aforesaid, or such relative or any other relative or friend of the Minor, to be Guardian of the person of the Minor

Court may appoint person having such Certificate Guardian of the Minor's person.

VIII. The Court may call upon the Collector or Magistrate for a report on the character and qualification of any relative or friend of the Minor who may be desirous or willing to be entrusted with the charge of his property or person.

Court may call upon Collector or Magistrate for a report on the character and qualification of relative or friend.

IX. If no title to a Certificate be established to the satisfaction of the Court by a person claiming under a Will or Deed, and if there be no near relative willing and fit to be entrusted with the charge of the property of the Minor, and the Court shall think it to be necessary for the interest of the Minor that provision should be made by the Court for the charge of his property and person, the Court may proceed to make such provision in the manner hereinafter provided.

Proceeding if no title to a Certificate be established, and if there be no relative fit to be entrusted with the property, &c., of a Minor.

X. If the estate of the Minor consist of moveable property or of houses, gardens, or the like, the Court may grant a Certificate to the Public Curator appointed under Section XIX., Act XIX of 1841 (*for the protection of moveable and immoveable property against wrongful possession in certain cases*), or, if there be no Public Curator, to any fit person whom the Court may appoint for the purpose.

If estate consist only of moveable property, &c., Court may grant Certificate to Public Curator or other person.

XI. Whenever the Court shall grant a Certificate of administration to the estate of a Minor to the Public Curator or other person as aforesaid, it shall at the same time appoint a Guardian to take charge of the person and maintenance of the Minor. The person to whom a Certificate of administration has been granted, unless he be the Public Curator, may be appointed Guardian If the person appointed to be Guardian be unwilling to discharge the trust gratuitously, the Court may assign him such allowance, to be paid out of the estate of the Minor, as under the circumstances of the case it may think suitable. The Court may also fix such allowance as it may think proper for the maintenance of the Minor; and

Appointment of guardian.

Guardian's allowance.

NATIONAL ARCHIVES OF INDIA

Minor's allowance.

such allowance and the allowance of the Guardian (if any) shall be paid to the Guardian by the Public Curator or other person as aforesaid.

When the estate consists of land, Court may direct Collector to take charge of estate. Appointment of Manager and Guardian thereupon.

XII. If the estate of the Minor consist, in whole or in part, of land or any interest in land, the Court may direct the Collector to take charge of the estate, and thereupon the Collector shall appoint a Manager of the property of the Minor and a Guardian of his person, in the same manner and subject to the same rules in respect of such appointments and of the duties to be performed by the Manager and Guardian respectively, so far as the same may be applicable, as if the property and person of the Minor were subject to the jurisdiction of the Court of Wards.

(This section was repealed by Act IX (B.C.) of 1879).

Costs of enquiries under this Act.

XIII. In all enquiries held by the Civil Court under this Act, the Court may make such order as to the payment of costs by the person on whose application the enquiry was made, or out of the estate of the Minor or otherwise as it may think proper.

When an estate, some of the co-proprietors of which are still Minors, ceases to be subject to the Court of Wards, Civil Court may direct Collector to retain charge of shares and persons of Minors.

XIV. Whenever one or more of the proprietors of an estate which has come under the jurisdiction of the Court of Wards on account of the disqualification of all the proprietors, ceases to be disqualified, and the estate, in consequence, ceases to be subject to the jurisdiction of the Court of Wards, notwithstanding the continued disqualification of one or more of the co-proprietors, the Collector of the District in which the estate is situate may represent the fact to the Civil Court; and the Court, unless it see sufficient reason to the contrary, shall direct the Collector to retain charge of the persons, and of the shares of the property of the still disqualified proprietors, during the continuance of their disqualification, or until such time as it shall be otherwise ordered by the Court. The Collector shall in such case appoint a Guardian for the care of the persons, and a Manager for the charge of the property, of the disqualified proprietors, in the manner prescribed in section XII. If the property be situate in more than one District, the representation shall be made by the Collector, who had the general management of the property under the Court of Wards, to the Civil Court of his own District, and the orders of the Court of that District shall have effect also in other Districts in which portions of the property may be situate.

Provision for case of estates situated in more than one District.

(This section was repealed by Act IX (B.C.) of 1879).

NATIONAL ARCHIVES OF INDIA

Proceedings of Collector subject to control of superior Revenue authorities.

XV. The proceedings of the Collector in the charge of estates under this Act shall be subject to the control of the superior Revenue-authorities.

(This section was repealed by Act IX (B.C.) of 1879).

Public Curator, &c., to furnish inventory and annual accounts.

XVI. The Public Curator and every other Administrator to whom a Certificate shall have been granted under Section X. shall, within six months from the date of the Certificate, deliver in Court an inventory of any immoveable property belonging to the Minor, and of all such sums of money, goods, effects, and things as he shall have received on account of the estate, together with a statement of all debts due by or to the same. And the Public Curator and every such other Administrator shall furnish annually, within three months from the close of the year of the era current in the District, an account of the property in his charge, exhibiting the amounts received and disbursed on account of the estate, and the balance in hand. If any relative or friend of a Minor or any Public Officer, by petition to the Court, shall impugn the accuracy of the said inventory and statement or of any annual account, the Court may summon the Curator or Administrator and enquire summarily into the matter, and make such order thereon as it shall think proper, or the Court at its discretion may refer such petition to any subordinate Court.

Proceeding if accuracy of inventory or account be impugned.

Public Curator, &c., to pay proceeds of estates into Treasury. Surplus funds to be invested in public Securities.

XVII. All sums received by the Public Curator or such other Administrator on account of any estate, in excess of what may be required for the current expenses of the Minor or of the estate, shall be paid into the public Treasury on account of the estate, and may be invested from time to time in the public Securities.

Powers of person to whom Certificate has been granted, in the management of a Minor's estate.

XVIII. Every person to whom a Certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a Minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the Minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.

Relative or friend may sue for an account.

XIX. It shall be lawful for any relative or friend of a Minor, at any time during the continuance of the minority, to sue for an account from any Manager appointed under this Act, or from any person to whom a Certificate shall have been granted under the provisions of this Act, or from any

NATIONAL ARCHIVES OF INDIA

such Manager or person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate.

(This section was repealed by Act IX (B.C.) of 1879).

XX. If the disqualification of a person, for whose benefit a suit shall have been instituted under this Act cease before the final decision thereof, it shall be lawful for such person to continue the prosecution of the suit on his own behalf.

Continuance of suit instituted under this Act after disqualification shall have ceased.

XXI. The Civil Court for any sufficient cause may recall any Certificate granted under this Act, and may direct the Collector to take charge of the estate, or may grant a Certificate to the Public Curator or any other person as the case may be; and may compel the person whose Certificate has been recalled to make over the property in his hands to his successor, and to account to such successor for all moneys received and disbursed by him. The Court may also for any sufficient cause remove any Guardian appointed by the Court.

Revocation of certificate.

Removal of guardian.

XXII. The Civil Court may impose a fine not exceeding five hundred Rupees on any person who may wilfully neglect or refuse to deliver his accounts or any property in his hands, within the prescribed time, or a time fixed by the Court; and may realize such fine by attachment and sale of his property under the rules in force for the execution of decrees of Court; and may also commit the recusant to close custody until he shall consent to deliver such accounts or property.

Penalty for neglect or refusal to deliver accounts or property.

XXIII. The Civil Court may permit any person to whom a Certificate shall have been granted under this Act not being the Public Curator, and any Guardian appointed by the Court, to resign his trust; and may give him a discharge therefrom on his accounting to his successor, duly appointed, for all moneys received and disbursed by him, and making over the property in his hands.

Civil Court may permit resignation of trust, &c.

XXIV. The Public Curator and every other Administrator to whom a Certificate shall have been granted under section X., shall be entitled to receive such commission not exceeding five per centum on the sums received and disbursed by him, or such other allowance, to be paid out of the minor's estate, as the Civil Court shall think fit.

Remuneration of Public Curator, &c.

XXV. Every Guardian appointed by the Civil Court, or by the

NATIONAL ARCHIVES OF INDIA

Collector under this Act, who shall have charge of any male Minor, shall be bound to provide for his education in a suitable manner. The general superintendence and control of the education of all such Minors shall be vested in the Civil Court or in the Collector, as the case may be; and the provisions of Act XXVI of 1854 (*for making better provision for the education of male Minors subject to the superintendence of the Court of Wards*) shall, so far as is consistent with the provisions herein contained, be applicable to the Civil Court, or to the Collector, as the case may be, in respect to such Minors, and to every such Guardian.

Guardians of Minors under this Act to provide for their education.

Act XXVI of 1854 declared applicable.

Persons under the age of 18 years to be held Minors for the purposes of this Act.

XXVI. For the purpose of this Act, every person shall be held to be a Minor, who has not attained the age of eighteen years.

Act not to authorize the appointment of Guardians of certain married women and other persons.

XXVII. Nothing in this Act shall authorize the appointment of a Guardian of the person of a female whose husband is not a Minor, or the appointment of a Guardian of the person of any Minor whose father is living and is not a Minor; and nothing in this Act shall authorize the appointment of any person other than a female as the Guardian of the person of a female.

Guardianship during the minority of the father or husband of a Minor when to cease.

If a Guardian of the person of a Minor be appointed during the minority of the father or husband of the minor, the Guardianship shall cease as soon as the father or husband (as the case may be) shall attain the age of majority.

Appeals.

XXVIII. All orders passed by the Civil Court or by any Subordinate Court under this Act shall be open to appeal under the rules in force for appeals, in miscellaneous cases, from the orders of such Court and the subordinate Courts.

Construction of the words "Civil Court." Powers of Supreme Court not affected.

XXIX. The expression "Civil Court" as used in this Act shall be held to mean the principal Court of original jurisdiction in the District, and shall not include the Supreme Court; and nothing contained in this Act shall be held to affect the powers of the Supreme Court over the person or property of any Minor subject to its jurisdiction.

Number. Gender.

Unless the contrary appears from the context, words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing the masculine gender shall include females.

NATIONAL ARCHIVES OF INDIA

# ACT NO. IX OF 1861.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

**(Received the assent of the Governor General on the 24th April, 1861.)**

*An Act to amend the law relating to minors.*

Preamble.

WHEREAS it is expedient to amend the Law for hearing suits relative to the custody and guardianship of minors; It is enacted as follows:—

Application.

I Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner or his agent, if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition and the determination of the right to the custody or guardianship of such minor.

Production and temporary custody and protection, of Minor.

II. The Court may direct that the person having the custody or being in possession of the person of such minor shall produce him or her in Court or in any other place appointed by the Court on the day fixed for the hearing of the petition or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

Court, after hearing statements of the parties &c., to make order regarding custody or guardianship of minor.

III. On the day appointed for the hearing of the petition or as soon after as may be practicable, the Court shall hear the statements of the parties or their agents if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case.

Procedure.

IV. In cases instituted under this Act, the Court shall be guided by the procedure prescribed in Act VIII of 1859 (*for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter*) in so



NATIONAL ARCHIVES OF INDIA

far as the same shall be applicable and material; and any order made by the Court may be enforced as if such order had been made in a regular suit.

Appeal.

V. An appeal shall lie to the Sudder Court from any order made by a lower Court under this Act, under the rules applicable to regular appeals to such Sudder Court, except that the petition of appeal may be written on a stamp paper of the value prescribed for petitions to the Sudder Court.

Orders passed under this Act not liable to be contested in a regular suit.

VI. Any order passed under this Act, in respect to the custody or guardianship of a minor, shall not be liable to be contested in a regular suit.

Saving of laws.

VII Nothing in this Act shall be taken to interfere with the jurisdiction exercised under the Laws in force by any Supreme Court of Judicature or the Courts of Wards; or under Act XXI of 1855 (*for making better provision for the education of male minors and the marriage of male and female minors, subject to the superintendence of the Court of Wards in the Presidency of Fort Saint George*), and Act XL of 1858 (*for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal*).

Interpretation.

VIII. The term "Sudder Court" in this Act shall denote the Highest Court of Appeal in any part of the British Territories in India.

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## ACT NO. XX OF 1864.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

**(Received the assent of the Governor General on the 24th March, 1864.)**

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*An Act for making better provision for the care of the persons and property of Minors in the Presidency of Bombay.*

Preamble.

WHEREAS it is expedient to make better provision for the care of the persons and property of Minors in the Presidency of Bombay; It is enacted as follows:—

Care of persons and charge of property of Minors vested in the Civil Court.

I. The care of the persons of all Minors (not being European British subjects) and the charge of their property shall vest in the Civil Court.

NATIONAL ARCHIVES OF INDIA

What persons claiming to have charge of property in trust for a Minor may apply for Certificate of Administration.

II. Every person who shall claim a right to have charge of property in trust for a Minor under a Will or Deed or other instrument in writing, or by reason of nearness of kin or otherwise, may apply to the Civil Court for a Certificate of Administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge, until he shall have obtained such Certificate. Provided that when the property is of small value, not exceeding Rupees two hundred and fifty, any Court having jurisdiction may allow any relative of a Minor to institute or defend a suit on his behalf, although a Certificate of Administration has not been granted to such relative.

No person to institute or defend a suit without such Certificate.

Proviso.

Who may apply to Court to appoint a person to take charge of the property, &c., of a Minor.

III. Any relative or friend of a Minor in respect of whose property such Certificate has not been granted, or if the property consist in whole or in part of land or any interest in land, the Collector of the District, may apply to the Civil Court to appoint a fit person to take charge of the property and person of such Minor.

To what Court application to be made if property be situate in more than one District.

IV. If the property be situate in more than one District, any such application as aforesaid shall be made to the Civil Court of the District in which the Minor has his residence.

Summary inquiry to be made by Court on application.

V. When application shall have been made to the Civil Court either by a person claiming a right to have charge of the property of a Minor, or by any relative or friend of a Minor, or by the Collector, the Court shall issue notice of the application and fix a day for hearing the same. On the day so fixed, or as soon after as may be convenient, the Court shall inquire summarily into the circumstances, and pass orders in the case. Provided always that it shall be competent to the Civil Court to direct any Court subordinate to it to make such inquiry and report the result.

Proviso.

Certificate of Administration to whom to be granted.

VI. If it shall appear that any person claiming a right to have charge of the property of a Minor is entitled to such right by virtue of a Will or Deed or other instrument in writing, and is willing to undertake the trust, the Court shall grant a Certificate of Administration to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust and there is any near relative of the Minor who is willing and fit to be entrusted with the charge of his

NATIONAL ARCHIVES OF INDIA

property, the Court may grant a Certificate to such relative. The Court may also if it think fit (unless a Guardian have been appointed by the father), appoint such person as aforesaid, or such relative or any other relative or friend of the Minor, to be Guardian of the person of the Minor.

Court may appoint person having such Certificate Guardian of Minor's person.

VII. The Court may call upon the Collector or Magistrate for a report on the character and qualification of any relative or friend of the Minor, who may be desirous or willing to be entrusted with the charge of his property or person, and it shall be incumbent on the Collector or Magistrate to furnish such report after making all due inquiry.

Court may call upon Collector or Magistrate for a report on the character and qualification of relative or friend.

VIII. If no title to a Certificate be established to the satisfaction of the Court by a person claiming under a Will or Deed or other instrument in writing, and if there be no near relative willing and fit to be entrusted with the charge of the property or person of the Minor, and the Court shall think it to be necessary for the interest of the Minor that provision should be made by the Court for the charge of his property or person, the Court shall proceed to make such provision in the manner hereinafter provided.

Proceeding if no title to a Certificate be established, and if there be no relative fit to be entrusted with the charge of property, &c., of Minor.

IX. If the estate of the Minor consists of moveable property or of houses, gardens, or the like, the Court shall grant a Certificate to the Public Curator appointed under Section XIX., Act XIX of 1841 (*for the protection of moveable and immoveable property against wrongful possession in cases of successions*), or if there be no Public Curator to any fit person whom the Court may select for the purpose.

If estate consists of moveable property, &c., Court may grant Certificate to Public Curator or other person.

X. Whenever the Court shall grant a Certificate of Administration to the estate of a Minor as aforesaid, it shall at the same time appoint a Guardian to take charge of the person and maintenance of the Minor. The person to whom a Certificate of Administration has been granted, unless he be the Public Curator, or the legal heir of the Minor, or next in succession to the property, may be appointed Guardian. Provided that in the case of Minors who have inherited property by adoption, the natural father may be appointed Guardian. If the person appointed to be Guardian be unwilling to discharge the trust gratuitously, the Court may assign him such allowance to be paid out of the estate of the Minor as under the circumstances of the case it may think suitable. The Court may also fix such

Appointment of Guardian.

Guardian's allowance.

NATIONAL ARCHIVES OF INDIA

allowance as it may think proper for the maintenance of the Minor, surviving parent whether natural or adoptive, husband, wife and children, if any, and such allowance and the allowance of the Guardian (if any) shall be paid to the Guardian by the Public Curator or other person as aforesaid.

Allowance for maintenance of Minor, &c.

XI. If the estate of the Minor consist in whole or in part of land or any interest in land, the Court may direct the Collector of the District in which the larger part of the same may be situated to take charge of the estate.

When the estate consists of land, Court may direct Collector to take charge of estate.

XII. The Civil Court may take such security as it shall think necessary, from any person to whom it may grant a Certificate of Administration of the property of any Minor under this Act. Provided always, that no such security shall be demanded from the Collector of a District or the Public Curator, when their services may be availed of.

Court may take security.

Proviso.

XIII. In all inquiries and other proceedings held or had by the Civil Court under this Act, the Court may make such order as to the payment of costs by the person on whose application such inquiry was made or proceeding had, or out of the estate of the Minor, or otherwise, as it may think proper.

Cost of inquiries under this Act.

XIV. Whenever one or more of the proprietors of an estate which has been placed under the Collector's charge shall have passed his or their minority, the Collector shall represent the fact to the Civil Court, and the Court, unless it see sufficient reason to the contrary, may direct the Collector to retain charge of the shares of the property of the still disqualified proprietors during the continuance of their disqualification, or until it shall be otherwise ordered by the Court; or the Court may direct the whole estate to be made over to the management of the proprietor or proprietors who shall have become of age, with such directions as to the share or shares of the still disqualified proprietor or proprietors as to the Court shall seem fit and proper.

Course to be followed when one or more of the proprietors of an estate placed under Collector's charge may come of age.

XV. The proceedings of the Collector in the charge of estates under this Act shall be subject to the control of the superior Revenue Authorities.

Proceedings of Collector subject to control of superior Revenue Authorities.

XVI. The Public Curator and every other Administrator to whom a

NATIONAL ARCHIVES OF INDIA

Certificate shall have been granted under Section X. shall, within six months from the date of the Certificate, deliver in Court an inventory of all the immoveable property belonging to the Minor, and of all such sums of money, goods, effects, and things as he shall have received on account of the estate, together with a statement of all debts due by or to the same. And the Public Curator and every such other Administrator shall furnish annually within three months from the first of May of the Christian era an account of the property in his charge, exhibiting the amounts received, disbursed, and invested on account of the estate, and the balance in hand. If any relative or friend of a Minor, or any public officer by petition to the Court shall impugn the accuracy of the said inventory and statement or of any annual account, the Court may summon the Curator or Administrator, and inquire summarily into the matter and make such order thereon as it shall think proper; or the Court, at its discretion, may refer such petition to any subordinate Court for investigation and report.

Public Curator, &c., to furnish inventory and annual accounts.

Proceeding if accuracy of inventory or account be impugned.

XVII. All sums received by the Public Curator or such other Administrator on account of any estate, in excess of what may be required for the current expenses of the Minor or of the estate, shall by him be invested on account of the estate from time to time, in the Public Securities.

Surplus funds to be invested by Public Curator, &c., in Public Securities on account of estate.

XVIII. Every person to whom a Certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a Minor, and may collect and pay all just claims, debts, and liabilites due to or by the estate of the Minor. But no such person shall have power to sell, alienate, mortgage, or otherwise incumber any immoveable property, or to grant a lease thereof for any period exceeding five years, without the sanction of the Civil Court previously obtained.

Powers of person to whom Certificate has been granted in the management of Minor's estate.

XIX. It shall be lawful for any relative or friend of a Minor at any time during the continuance of the minority to sue for an account from any Manager appointed under this Act, or from any person to whom a Certificate shall have been granted under the provisions of this Act, or from any such Manager or person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate.

Relative or friend may sue for an account.

NATIONAL ARCHIVES OF INDIA

Continuance of suit instituted under this Act after disqualification shall have ceased.

XX. If the disqualification of a person for whose benefit a suit shall have been instituted under this Act cease before the final decision thereof, it shall be lawful for such person to continue the prosecution of the suit on his own behalf.

Revocation of Certificate.

Removal of Guardian.

XXI. The Civil Court for any sufficient cause may recall any Certificate granted under this Act, and may direct the Collector to take charge of the estate, or may grant a fresh Certificate to the Public Curator or any other person as the case may be, and may compel the person whose Certificate has been recalled to make over the property in his hands to his successor, and account to such successor for all moneys received and disbursed by him. The Court may also for any sufficient cause remove any Guardian appointed by the Court.

Penalty for neglect or refusal to deliver accounts or property.

XXII. The Civil Court may impose a fine not exceeding five hundred Rupees on any person who may wilfully neglect or refuse to deliver his accounts or any property in his hands, within the prescribed time or a time fixed by the Court, and may realize such fine by attachment and sale of his property under the rules in force for the execution of decrees of Court, and may also commit the recusant to confinement in the Civil Jail until he shall consent to deliver such accounts or property.

Civil Court may permit resignation of trust, &c.

XXIII. The Civil Court may permit any person to whom a Certificate shall have been granted under this Act not being the Public Curator, and any Guardian appointed by the Court, to resign his trust, and may give him a discharge therefrom on his accounting to his successor duly appointed for all moneys received and disbursed by him and making over the property in his hands.

Remuneration of Public Curator, &c.

XXIV. The Public Curator and every other Administrator to whom a Certificate shall have been granted under Section X. shall be entitled to receive such commission not exceeding five per centum on the sums received and disbursed by him, or such other allowance to be paid out of the Minor's estate, as the Civil Court shall think fit.

Guardian of Minors under this Act to provide for their education.

XXV. Every Guardian appointed by the Civil Court under this Act who shall have charge of any male Minor shall be bound to provide for his education in a suitable manner. The general superintendence and control of the education of all such Minors shall be vested in the Civil Court.

NATIONAL ARCHIVES OF INDIA

Civil Court may fix the residence and place of education of Minor.

XXVI. In the exercise of this superintendence and control, it shall be lawful for the Civil Court to direct that such Minor shall reside either with or without his guardian at the Sudder Station of the District, or at any other place within the Presidency of Bombay, and shall attend for the purposes of education such School or College as to the said Civil Court may seem expedient, and to make such provision as may be necessary for the proper care and suitable maintenance of the said Minor whilst attending such School or College.

Or in certain cases cause Minor to be educated privately.

XXVII. If it shall appear to the Civil Court inexpedient to place any such minor at School or College, it shall, if the proceeds of the estate are sufficient for that purpose, cause such Minor to be educated by a private tutor properly qualified, either at the family residence of such Minor or at the Sudder Station, or elsewhere within the Presidency of Bombay, and in that case also the Civil Court shall have power to determine, from time to time, the place of residence of such Minor, and to make such provision as may be necessary for his proper tuition and maintenance during the period of his education.

Charges and expenses incurred under this Act for education, &c., to be paid out of the profits of Minor's estate.

XXVIII. All charges and expenses which may be incurred on account of any male Minor under the provisions of this Act, for College or School fees, or for other charges of tuition or education, or by reason of his residence in any place other than his own home or otherwise, shall be defrayed from the profits of his estate in the same manner as other expenses incurred under the authority or with the sanction of the Civil Court.

Marriage of Minors.

XXIX. Every Guardian appointed under this Act, who shall have charge of an unmarried Minor, shall pay all the necessary expenses of the marriage of such Minor out of the estate; provided that these expenses shall in no case, without the sanction of the Civil Court, involve the Minor's estate in debt.

Who to be held a Minor for the purposes of this Act.

XXX. For the purposes of this Act, every person shall be held to be a Minor who has not attained the age of eighteen years.

Act not to authorize the appointment of Guardians of certain married women.

Guardianship during the minority of the husband of Minor when to cease.

XXXI. Nothing in this Act shall authorize the appointment of a Guardian of the person of a female whose husband is not a Minor, or the appointment of any person other than a female as the Guardian of the person of a female. If a Guardian of the person of a Minor be appointed during the minority of the husband of the Minor, the Guardianship shall cease as soon as the husband shall attain the age of majority.

NATIONAL ARCHIVES OF INDIA

Act not to interfere with Act XXXV of 1858.

XXXII. Nothing in this Act shall be held to interfere with the provisions of Act XXXV of 1858 (*for making better provision for the care of the Estates of Lunatics*).

Orders of the Civil Court open to appeal.

XXXIII. All orders passed by the Civil Court under this Act shall be open to appeal to the High Court at Bombay, and shall be subject to all the provisions contained in section 366 of the Code of Civil Procedure.

Construction of words "Civil Court."

Powers of High Court not to be affected.

XXXIV. The expression "Civil Court" as used in this Act shall be held to mean the principal Court of original Civil Jurisdiction in the District, and shall not include the High Court of Judicature; and nothing contained in this Act shall be held to affect the powers of the High Court of Judicature over the person or property of any Minor subject to its jurisdiction.

Number.

Gender.

Unless the contrary appears from the context, words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing the masculine gender shall include females.

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## ACT XIII OF 1874.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

**(Received the assent of the Governor General on the 8th December, 1874.)**

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*An Act to provide in the Punjáb and elsewhere for the guardianship of European British Minors.*

Preamble.

WHEREAS it is expedient to provide in the Punjáb, Oudh, the Central Provinces, British Burma, Coorg, Ajmer and Mairwára and Assam for the guardianship of minors who either are born in the United Kingdom or any British Colony, or are the children or grandchildren of persons so born; It is hereby enacted as follows:—

## PART I.

### PRELIMINARY.

Short title.

1. This Act may be called "The European British Minors Act, 1874:"

Local extent.

It extends to the territories respectively subject to the government of the Lieutenant-Governor of the Punjáb and to the administration of the Chief Commissioners of



NATIONAL ARCHIVES OF INDIA

Oudh, the Central Provinces, British Burma, Coorg, Ajmer and Mairwára and Assam;

Personal application.

So far as relates to minors, it applies only to persons born in the United Kingdom of Great Britain and Ireland, or any British Colony, plantation or settlement other than British India, and to their children and grandchildren;

Commencement.

And it shall come into force at once.

2. In this Act—

'Minor.'

'Minor' means a person who has not completed the age of eighteen years;

'Guardian.'

'Guardian' means a person who is appointed to take care of a minor's person or property, or both; and

'Court.'

'Court' means the highest Civil Court of appeal in any territory (other than British Burma) to which this Act extends.

In British Burma 'Court' means, in the Town of Rangoon, the Court of the Recorder of Rangoon, and, elsewhere, the Court of the Deputy Commissioner.

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## PART II.

### APPOINTMENT OF GUARDIANS.

Appointment by parent.

3. A guardian of the person or property, or both, of any minor may be appointed by will or other instrument to take effect upon the death of the parent appointing—

(*a*) if the minor is legitimate, by the father, or by either parent if the other is dead or incapable of acting;

(*b*) if the minor is illegitimate, by the mother.

Appointment by Court.

4. If the Court within the local limits of whose jurisdiction any minor resides finds that the guardianship of his person or property has not been sufficiently provided for under section three, the Court may appoint a guardian of his person or property, or both, as the case may be.

If the minor has several properties, the Court may, if it think fit, appoint a guardian for each such property.

If the Court appoints a guardian for any property situate beyond the local limits of its jurisdiction, the Court within the local limits of

NATIONAL ARCHIVES OF INDIA

whose jurisdiction such property may be situate shall accept such guardian as duly appointed and give effect to the order appointing him.

Application for appointment.

5. Whoever desires to be appointed the guardian of a minor's person or property, or both, may apply to the Court within the local limits of whose jurisdiction the minor resides by petition setting forth the grounds of his application, and showing—

(*a*) the minor's age and residence;

(*b*) the nature and amount of his property;

(*c*) what relatives he has in India or elsewhere; and

(*d*) the qualifications of the proposed guardian and his willingness to act as such.

Stamp.

The petition shall bear a stamp of five rupees, and the statements therein contained shall be verified by the petitioner or some other competent person in manner required by

Verification.

law for the verification of plaints, and may at the hearing be referred to as evidence.

Notice of application.

The Court, if satisfied that there is ground for proceeding, shall give notice of the application to the person (if any) named in the petition as having the custody or being in possession of the person or property of such minor, as well as to any other person whom the Court may think should receive such notice, and shall fix as early a day as may be convenient for the hearing of the petition.

Production of minor.

6. The Court may direct that the person (if any) having the custody of such minor shall produce him at such place and time as may be appointed by the Court, and may make such order for the temporary custody and protection of the minor's person or property as may appear proper.

Evidence of fitness.

7. On the day fixed for the hearing of the petition or as soon after as may be practicable, the petitioner shall adduce evidence to show the fitness of the proposed guardian;

and the Court shall make such order as it thinks fit in respect to the guardianship of the minor's person or property, or both, and the costs of the case.

Procedure.

8. In cases instituted under this Act, the Court shall be guided by the procedure prescribed in the Code of Civil Procedure in so far as the same is applicable; and any order made by the Court under section six or section seven may be enforced as if such order had been made in a regular suit or on appeal;

NATIONAL ARCHIVES OF INDIA

and all orders made under this Act by Deputy Commissioners in British Burma shall be appealable as if they were decrees.

Forms.

The forms set forth in the schedule hereto annexed, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such schedule.

Subsidiary rules.

And the Court may from time to time prescribe rules consistent with this Act for regulating the procedure hereunder:

Provided that in the case of Courts of Deputy Commissioners in British Burma, such rules shall be prescribed by the Judicial Commissioner.

Orders under this Act not to be contested.

9. Save as provided by section eight, no order passed under this Act in respect to the guardianship of a minor's person or property shall be liable to be contested in any other proceeding.

Rules for awarding custody of minor.

10. In appointing the guardian of a minor, the Court shall be guided by the following considerations:—

(*a*)—By what appears to be for the best interest of the minor in respect to his temporal and his mental and moral welfare; and if the minor is old enough to form an intelligent preference, the Court may consider that preference:

(*b*)—As between persons adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but if, other things being equal, the minor is of tender years, he should be given to the mother: if he is of an age to require education and preparation for labour and business, then to the father:

(*c*)—The Court shall also consider the following circumstances according as they may bear upon the guardianship of person or of property:—

(1) Nearness of relationship;

(2) The wishes of a deceased parent;

(3) Any existing or previous connection of the proposed guardian with the minor's person or property.

NATIONAL ARCHIVES OF INDIA

# PART III.

## GUARDIANS' DUTIES, RIGHTS AND LIABILITIES.

*A.—Guardians of the person.*

Duties of guardian of the person.

11. A guardian of the person is charged with the custody of the ward, and must look to his support, health and education.

Wards' religion.

12. A ward is presumed to be of his father's religion; and the guardian, in the absence of the Courts' direction to the contrary, must train the ward in such religion. If the ward is old enough to form an intelligent preference for any religion, the Court, in giving such direction, shall attend to such preference.

Guardian entitled to custody of ward.

13. Any ward who may desert his home may be compelled by order of the Court to return. But such order may be withheld by the Court if it appear—

(*a*) that the ward has been subjected to maltreatment at the hands of his guardian;

(*b*) that the conduct of the guardian in other respects renders him unfit for the office, or

(*c*) that the ward is on reasonable grounds unwilling to return and is old enough to form an intelligent preference on such a subject.

Removal of ward from jurisdiction.

14. No guardian of the person appointed by the Court shall, without the leave of the Court, remove its ward from the limits of its jurisdiction.

Any person wilfully contravening this prohibition shall be liable by order of the Court to fine not exceeding one thousand rupees, or to imprisonment for a term which may extend to six months, or to both.

*B.—Guardians of property.*

Duties of guardian of property.

15. A guardian of the property shall keep safely the property of his ward.

Prohibition of waste.

In the case of immoveable property, he shall not suffer any waste, but shall maintain the buildings (if any) thereon and their appurtenances out of the rents and profits of the property.

Power to lease.

16. The guardian of any immoveable property may make leases for any term not exceeding a year, or from year to year, of such property or any part thereof; and with the sanction of the Court, may make such lease of the property, or any

NATIONAL ARCHIVES OF INDIA

part thereof, for such term of years and subject to such rents and covenants as the Court may direct; but in no such case shall any fine or premium be taken.

The lease shall be settled by an officer of the Court, and a counterpart thereof shall be executed by the lessee, and shall be deposited for safe custody in the Court until the ward completes the age of eighteen years; but all proper parties shall have the use thereof, if necessary, for the purpose of enforcing any covenant therein contained.

Power to use principal for ward's maintenance, &c.

17. The Court may order that the principal of the ward's property, or any part thereof, shall be applied for his maintenance, education or advancement, and the guardian of such property shall obey such order.

Rules as to guardians of property.

18. Every guardian of the property of a minor shall—

(*a*) give such security, if any, as the Court thinks fit duly to account for what he shall receive in respect of the minor's property;

(*b*) pass his accounts at such periods and in such form as the Court directs;

(*c*) pay the balance due from him thereon;

(*d*) be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties;

(*e*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

*C.—As to all Guardians.*

Minor guardians incompetent to act.

19. No person appointed a guardian shall be competent to act as such unless he has completed the age of eighteen years.

Guardian under control of Court.

20. Every guardian, whether appointed by a parent or under this Act by a Court, is subject to the control of the Court within the local limits of whose jurisdiction he resides.

Death of joint guardian.

21. On the death of one of two or more joint guardians, whether appointed by a parent or under this Act, the power continues to the survivor or survivors until a further appointment is made by the Court.

Removal of guardian.

22. A guardian may be removed by the Court for any of the following causes:—

(*a*) for abuse of his trust;

(*b*) for continued failure to perform its duties;

NATIONAL ARCHIVES OF INDIA

(*c*) for incapacity to perform its duties;

(*d*) for gross immorality;

(*e*) for having an interest adverse to the faithful performance of his duties;

(*f*) for removal from the local limits of the jurisdiction of the Court;

(*g*) the arrival, within such local limits, of some person whose guardianship the Court may think likely to be more beneficial to the minor than the guardianship of the person so removed;

(*h*) In the case of a guardian of the property, for insolvency.

Appointment of successor.

In any such case the Court may appoint a successor to the guardian so removed.

Resignation of guardian.

23. Any guardian, whether appointed by a parent or by the Court, desiring to resign his office may apply to the Court to discharge him,

and if the Court finds that there is some other proper person whom it may appoint to such guardianship, it shall discharge the guardian accordingly and appoint such other proper person in his place.

Application for appointment on guardian's removal or resignation.

24. Applications for appointments under section twenty-two or section twenty-three shall be made in manner provided in section five; and the procedure thereon shall be in accordance with section seven.

Close of authority of guardian.

25. The power of a guardian of the person ceases—

(*a*) by his removal or discharge;

(*b*) by the ward's attaining majority; and,

(*c*) in the case of a female ward by her marriage followed by co-habitation.

The power of a guardian of the property ceases—

(*a*) by his removal or discharge;

(*b*) by the ward's attaining majority.

NATIONAL ARCHIVES OF INDIA

## SCHEDULE.

*I.—Petition for appointment of Guardian.*

(*See Section* 5.)

In the Chief Court of the Punjáb [*or* In the Court of the Recorder of Rangoon, *or as the case may be*].

In the matter of *A. B.*, a minor, by *C. D.*, his next friend.

To Mr. Justice (*or as the case may be*).

The petition of *C. D.* of

Showeth—

1. The said *A. B.* is now of the age of years and upwards. He is the same person as '*A*, son of *C.* and *L. B.*' named in the paper-writing now produced and shown to me and marked *A*, and purporting to be a copy under the seal of the General Register Office of the entry No. in the certified copy of entries of births in the district of *D*, in the county of *L*, for the year 187 .

2. The said *A. B.* is absolutely entitled, under the will of *his maternal uncle E. F.*, late of (*residence and addition*) to the following properties (namely) :—

(*a*) a house in let to *N. O.* as yearly tenant at Rs. 1,000 a year.

(*b*) Rs. 20,000 in the four per cent. securities of the Government of India, standing in the names of *R. S.* and *T. W.*, the trustees of the will of the said *E. F.*

(*c*) Rs. 800 cash in the hands of the said *R. S.* and *T. W.*, arisen from dividends on the said stock.

3. The only relations of the said *A. B.* now living are—(*a*) your petitioner, his maternal uncle; (*b*)—*S. H.*, wife of *T. H.* of (*residence and addition*), the half-sister of the said *A. B.*, and (*c*)—*R. D. V.*, the half-brother of the said *A. B.*, who is a Captain in Her Majesty's Army, and now stationed at Bombay.

4. The said *A. B.* was, at the time of the death of his father, *C. B.*, which happened on the 187 , and is now, residing as a scholar at Bishop Cotton's School, Simla, in the custody of the Rev. *M. N.*, the headmaster.

5. Your petitioner [*here state his qualifications as guardian, e.g., that he has attained his majority, is married, has children, resides with his family at some reasonably healthy place, mentioning it, holds a responsible office, stating it*], and is willing to act as the guardian of the person and property [*or as may be*] of the said *A. B.* during his minority in case this Hon'ble Court shall think fit to appoint me to that office.

NATIONAL ARCHIVES OF INDIA

Your petitioner therefore prays this Hon'ble Court—

1. That your petitioner or some other proper person may, upon giving security, be appointed the guardian of the person and property of the said *A. B.* during his minority, or until further order.

2. And that the said *C. D.* or other such guardian may from time to time pass his accounts and pay the balances which shall be certified to be due from him into the Government Treasury to the credit of this matter, and that such balances may be laid out in securities of the Government of India, or in loans or bonds secured by the Imperial Parliament on the revenues of India, or in debentures of railways guaranteed by the Government of India, and the interest to accrue thereon and all accumulations of interest be laid out in like manner.

3. And that the costs of this petition may be taxed as between attorney and client; and that the said *C. D.* or other such guardian may retain and pay the same out of any monies of the said minor which may come to his hands and be allowed the same on passing his said accounts.

(Signed) *C. D.*

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*Form of Verification.*

(*See section* 5.)

I, *C. D.*, the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

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*II.—Affidavit of Fitness of Guardian.*

(*See section* 7.)

In the Chief Court, &c., (*or as the case may be*).

In the matter of *A. B.*, a minor, by *C. D.*, his next friend.

I, *E. F.*, of (*residence and addition*), make oath and say as follows :—

1. I know and have for years past been well acquainted with *C. D.*, the petitioner in this matter.

2. The said *C. D.* is married and has children namely, a son of the age of years and daughters of the respective ages of and years.

3. The said *C. D.* resides with his wife and children at

4. In my judgment and belief the said *C. D.* is a fit and proper



NATIONAL ARCHIVES OF INDIA

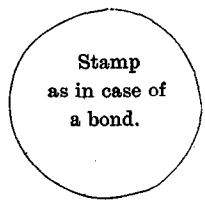
person to be appointed guardian of the person and property of his nephew, the said minor *A. B.*, for the following reasons (*state them*) :—

Sworn at , this day of 187 before me.

*E. F.*

(*Official character and description of E. F.*)

*III.—Recognizance by a Guardian of property and his surety, after an order appointing him subject to his giving security.*




*C. D.* (*the principal*), of (*residence and addition*), and *L. M.* (*the surety*) acknowledge themselves and each of them acknowledges himself to owe to the Secretary of State for India in Council the sum of Rs. [*to be regulated by the sum which the guardian is likely to receive during the currency of his periodical account*] to be paid to the said Secretary of State for India in Council; and unless they pay the same, they, the said *C. D.* and *L. M.*, do and each of them doth grant for himself, his executors and administrators that the said sum shall be levied and received from them and each of them and from their and his moveable and immoveable property.

(Short title.)
The Senior Judge of the Chief Court of the Punjab [*or as the case may be*] has approved of and allowed this recognizance.
*X. Y.*, *Registrar.*

Dated the day of 187 .

WHEREAS, by an order of the Court of made by (*name the Judge*), in a certain matter there pending, intituled 'In the matter of ' [*Recite the order appointing the guardian, subject to his giving security, and continue thus*] :—

And whereas (*name the Judge who has approved of the surety and recognizance*) has appproved of the above-bounden *L. M.* as surety for the said *C. D.*, and hath also approved of the above-written recognizance with the under-written condition as a proper security to be entered into by the said *C. D.* and *L. M.* pursuant to the said order, and in testimony of the said approbation, the Registrar [*or as the case may be*] of the said Court hath signed an allowance in the margin thereof.

Now the condition of the above-written recognizance is such, that if the said *C. D.* shall duly account for every sum of money which he shall

NATIONAL ARCHIVES OF INDIA

receive on account of the property of the said minor *A. B.* and the rents and profits and other income thereof, at such periods as the said Judge shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court or Judge hath directed, or shall hereafter direct, then the above recognizance shall be void, otherwise the same shall remain in force.

*C. D.* and *L. M.* { Taken and acknowledged by the above-named *C. D.* and *L. M.*, at in this day of 187 before me.

(*Signature and style of office of the officer by whom the recognizance is taken.*)

---

## THE COURT-FEES ACT.

## ACT NO. VII OF 1870.

## SCHEDULE I.

*Ad valorem fees.*

| Number. | | Proper fee. |
|---|---|---|
| 10. Certificate of administration granted under Act No. XL of 1858 *(for making better provision for the care of the persons and property of minors in the Presidency of Fort-William in Bengal)* or under Act No. XX of 1864 *(for making better provision for the care of the persons and property of minors in the Presidency of Bombay.)* | If the amount or value of the property in respect to which such certificate is granted does not exceed five hundred rupees .. .. | Five rupees. |
| | If such amount or value exceeds five hundred rupees but not one thousand rupees .. .. | Ten rupees. |
| | And for every one thousand rupees, or part thereof, in excess of one thousand rupees .. .. | Five rupees. |

(*The other enactments that have been repealed by the Guardians and Wards Act are not of much importance and are omitted.*)

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NATIONAL ARCHIVES OF INDIA

# APPENDIX B.

## THE INDIAN MAJORITY ACT.

### ACT NO. IX OF 1875.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

**(Received the assent of the Governor General on the 2nd March, 1875.)**

*An Act to amend the Law respecting the age of majority.*

Preamble.

WHEREAS, in the case of persons domiciled in British India, it is expedient to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority than now exists; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian Majority Act, 1875:"

Local extent.

It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty;

Commencement and operation.

and it shall come into force and have effect only on the expiration of three months from the passing thereof.

Savings.

2. Nothing herein contained shall affect—

(*a*) the capacity of any person to act in the following matters (namely),—marriage, dower, divorce, and adoption;

(*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or

(*c*) the capacity of any person who, before this Act comes into force, has attained majority under the law applicable to him.

Age of majority of persons domiciled in British India.

3. Subject as aforesaid, "every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age"[1] shall, not-

[1] These words were substituted for the words "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards" by the Guardians and Wards Act (VIII of 1890), sec. 52.

NATIONAL ARCHIVES OF INDIA

withstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before:

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

Age of majority how computed.

4. In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained his majority, if he falls within the first paragraph of section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the eighteenth anniversary of that day.

*Illustrations.*

(*a*) Z is born in British India on the first day of January, 1850, and has a British Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January, 1871.

(*b*) Z is born in British India on the twenty-ninth day of February, 1852, and has a British Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February, 1873.

(*c*) Z is born on the first day of January, 1850. He acquires a domicile in British India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January, 1868.

NATIONAL ARCHIVES OF INDIA

# APPENDIX C.

Rules made by the High Court of Judicature at Fort William in Bengal under the Guardians and Wards Act.

1. Every application for an order of appointment as guardian of a minor under Act VIII of 1890, and every bond executed under section 34 of the same Act, shall be in the following forms, with such variations as the circumstances of each case may require :—

Rule No. 1, dated the 17th March 1891 (Civil) published in the *Calcutta Gazette* of the 1st April 1891, Pt. I., p. 303.

**FORM OF APPLICATION UNDER SECTION 10, ACT VIII OF 1890.**

In the Civil Court of the District of_____

To

_____

*District Judge of*_____

*Dated*_____, *the*____ *of*_____18

The humble petition of_____

_____

son of_____,

resident of_____

SHOWETH,

That_____*, of_____, ordinarily residing at_____, was born on the_____of_____ 18 , and is by religion a_____and by sex a_____.

That the said_____is the wife† of_____

_____

_____.

That the said minor is entitled to certain property, to wit ‡

_____

_____.

That the said property is in the custody or possession of_____ residing at_____.

That_____§_____of_____has the custody of the person of the said minor.

* Son or daughter as the case may be.

† Omit this paragraph if a male; if a female unmarried, substitute the word unmarried; if married, state also the age of her husband.

‡ Here state nature, situation and approximate value, if any, of the property of the minor.

§ Son or daughter, and, if married, the name of the husband.

NATIONAL ARCHIVES OF INDIA

That the minor has the following near relations, *viz.*,_____ of_____, residing at †_____.

That‡_____.

That no guardian of the person or property of the said minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment.

That this application is for the appointment [or declaration, *as the case may be*] of a guardian to the §_____ of the said minor.

That your petitioner is ||_____.

That your petitioner, therefore, prays that an order appointing [or declaring, *as the case may be*]_____ to be guardian to the said minor be issued under section 7 of Act VIII of 1890.

And your petitioner as in duty bound, &c.

Here enter verification in the manner prescribed by the Code of Civil Procedure.¶

Signed in the presence of **

(*Signature of petitioner.*)

Solemnly affirmed befor me, this_____ day of_____ 18 .

*District Judge.*

* Son or daughter, and, if married, the name of the husband.

† State relationship to minor.

‡ Here state whether an application has at any time been made to this Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and if so, when, to what Court and with what result. If any guardian has been appointed, erase the next paragraph.

§ State whether to the person or the property, of the minor, or to both.

|| Here state the degree of relationship to, or connection with, the minor, or any other grounds on which the petitioner claims to be entitled to be appointed or declared guardian, and the causes which have led to the making of the application, together with such other particulars as may be necessary.

¶ The form of verification prescribed by the Code of Civil Procedure was substituted for the form of affirmation originally prescribed, by Rule No. 17, dated the 17th November 1891, published in the *Calcutta Gazette* of the 25th November 1891, Pt. I., p. 1002.

** If not so signed but admitted by the petitioner to the witness to be his signature, to be so stated.

NATIONAL ARCHIVES OF INDIA

I, _____, the guardian proposed in the above application, do hereby declare that I am willing to act as such.

Signed in the presence of *

(*Signature of the proposed guardian.*)†

**FORM OF BOND UNDER SECTION 34, ACT VIII OF 1890.**

KNOW ALL MEN by these presents that I _____ (a), _____ (b) of _____, of _____, am held and firmly bound to _____ (c), the District Judge of _____ in the sum of Rs. _____, to be paid to the said _____ (d) or to his successors in office, and we, _____ (e), son of _____ of _____, and _____ (f), son of _____, of _____, are jointly and severally held and firmly bound to the said _____ (g) in the sum of Rs. _____, to be paid to the said _____ (h) or to his successors in office, for the payment of which said sum of Rs. _____ to be faithfully and truly made, I, the above bounden _____ (i), bind myself, my heirs, executors, administrators, and representatives, and for the payment of the said sum of Rs. _____, we, the above-bounden _____ (j), and _____ (k), bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, administrators and representatives firmly by these presents. Signed by ourselves and sealed with our respective seals this _____ day of _____ 189 .

WHEREAS by an order of the Court of the District Judge of _____, made on the _____ day of _____ under section 7 of the Guardians and Wards Act (VIII of 1890) the above named _____ (l) has, subject to his entering into a bond in

* The declaration should be attested by at least two witnesses.

† The form of declaration was added by Rule No. 18, dated the 17th November 1891, published in the *Calcutta Gazette* of the 25th November 1891, Pt. I., pp. 1002 and 1003.

(*a*) Name of guardian.
(*b*) Son or daughter as the case may be.
(*c*) Name of District Judge.
(*d*) Name of District Judge.
(*e*), (*f*) } Names of sureties.
(*g*) Name of District Judge.
(*h*) Name of District Judge.
(*i*) Name of guardian.
(*j*), (*k*) } Names of sureties.
(*l*) Name of guardian.

NATIONAL ARCHIVES OF INDIA

Rs. _____ with _____ (1) sureties in the same sum (*or* sum of Rs. _____ *as the case may be*), been appointed guardian of the property, moveable and immoveable, of _____ (2), minor son of _____: And whereas the said _____ (3) has agreed to enter into the above-written bond and the said _____ (4) and _____ (5) have agreed to enter into the above-written bond as sureties for the said _____ (6). Now the condition of the above-written bond is such that if the said _____ (7) do and shall justly and truly account whenever called upon to do so, for what he may receive in respect of the property of the said _____ (8), and do and shall carefully observe, perform, and keep all orders and directions of the said Court of the District Judge of _____ touching or concerning the estate and effects of the said minor and his property and touching and concerning all such moneys and estates as he, the said _____ (9), shall receive as such guardian as aforesaid and in all things conduct himself properly, then the above-written bond or obligation shall be void and of no effect, otherwise the same shall remain in full force and virtue.

Signed and sealed by the above-named _____ (10) _____ Seal.

_____ _____ Seal.

in the presence of _____ Seal.

(1) Number of sureties.
(2) Here state name of minor.
(3) Name of guardian.
(4) } Names of sureties.
(5) }
(6) Name of guardian.
(7) Name of guardian.
(8) Name of minor.
(9) Name of guardian.
(10) Names of guardian and sureties.



NATIONAL ARCHIVES OF INDIA

Rule No. 2, dated the 9th June 1893, published in the *Calcutta Gazette* of the 21st June 1893, Pt. I., p. 572.

2. The High Court is pleased to prescribe the following form of notice for use under section 11 of Act VIII of 1890 :—

**FORM OF NOTICE UNDER SECTION 11 OF ACT VIII OF 1890.**

DISTRICT.....

IN THE COURT OF THE.....AT

*Present :*

CASE No. .....OF 189

Inhabitant of.....

*Petitioner.*

Application for the.....(1).....
of a guardian to the.....(2).....
of....., a minor, inhabitant
of.....

The petitioner abovenamed having applied to be.....(3)..... the guardian of the.....(2).....of the aforesaid minor, the .....day of.....189 , has been fixed for the hearing of the application, and notice is hereby given to.....(4)..... that if any other relative, friend, kinsman, or well-wisher of the aforesaid minor desire to be appointed or declared as guardian of the.....(2).....of the said minor, he should enter appearance in person in this Court on the aforesaid date, and be prepared to adduce on that day any documentary and oral evidence he may desire to adduce in support of his claim to such appointment or declaration.

Given under my hand and the seal of this Court, this..... day of.....189 .

(*No rules have yet been framed by the other High Courts*).

(1) Appointment *or* declaration, *as the case may be.*

(2) State whether to the person *or* the property of the minor, *or* to both.

(3) Appointed *or* declared.

(4) Name of person in case of notice under clause (*a*) of section 11; "*the public*" in case of general notice under clause (*b*).

NATIONAL ARCHIVES OF INDIA

# INDEX.

*[The figures in black type refer to the sections of the Act, those in ordinary type to the pages of the book.]*

## A


ABUSE OF TRUST—
what is, 61, 62
ground for removal of guardian, **39(a),** 60

ACCOUNT, suit for, against guardian or his representative, **36(1),** 58

ACCOUNTS—
failure of guardian to deliver, penalty for, **45,** 67
guardian to exhibit, if required, **34(c),** 56
to make over, on removal, **41(3),** 64
inspection of, power of High Court to make rules relating to the, **50(1)(f),** 74
preservation of, power of High Court to make rules relating to the, **50(1)(e),**74

ACKNOWLEDGMENT OF DEBT BY GUARDIAN, effect of, on limitation, 47

ACT—
applicability of, to cases arising under the repealed enactments, 3
to persons who ceased to be guardians before the Act, 3
European British subjects subject to the, 2

ADMISSION OF DEBT BY GUARDIAN—See ACKNOWLEDGMENT.

ADVANTAGE gained by guardian, 40

ADVICE by Court to guardian appointed by it, **33,** 54

AGE, EVIDENCE OF—See EVIDENCE.

AGE OF MAJORITY—
*Before the Indian Majority Act.*
Hindu law, under, 6
Mahamadan law, under, 6
East Indians and Native Christians, in case of, 6
European British subjects, in case of, 6
*After the Indian Majority Act*—See APPENDIX B.
uniform for all classes, 6
when guardian appointed by Court, 6
wards of Courts of Wards, in case of, 6

AGENCY TRACTS, application of Act to, 2

ALLOWANCE—
amount of, to go to Government when a Government officer appointed guardian, **22(2),** 42
guardian's, **22(1),** 42
rules by High Court, frame of, relating to, **50(1)(b),** 74

AMENDMENT
Code of Civil Procedure, of the, **53,** 76—78
Indian Majority Act, of the, **52,** 75


NATIONAL ARCHIVES OF INDIA

APPEAL—
who may, 14, 72
against what orders, lies, **47**, 70
appointing or declaring guardian or refusing to do so, from order, **47(a)**, 70
defining, restricting or extending powers of guardian, from order, **47(f)**, 71
imposing penalty, from order, **47(j)**, 71
inflicting penalty for not delivering property, &c., from order **47(j)**, 71
original side of High Court, from order on, 72
permission to dispose of property, from order refusing, **47(e)**, 71
Privy Council, to the, 72
refusing to discharge guardian, from order, **47(h)**, 71
regulating conduct or settling matters in difference, from order, **47(i)**, 71
removing guardian, from order, **47(g)**, 71
returning application for appointment of guardian, from order, **47(b)**, 70
s. 25 of the Act, from order under, **47(c)**, 70
s. 26 of the Act, from order under, **47(d)**, 71

APPLICABILITY OF ACT to guardians appointed under previous Acts, **51**, 75

APPLICATION FOR APPOINTMENT OF GUARDIAN—See GUARDIAN. APPOINTMENT BY CIVIL COURT.
*bonâ fide*, to be, 12
Court, to what, to be made, **9**, 15
fixing a day for hearing of, **11**, 19
form and contents of, **10**, 16
notice of, to be served on whom, **11**, 19, 20
procedure at hearing of, **13**, 22, 23
should not be granted when minor is on the point of attaining the age of 18, 14
verified, should be, **10**, 16
who may appear at hearing of, 22
whom, to be made by, **8**, 15

APPOINTMENT OF GUARDIAN—See GUARDIAN.
effect of, on age of majority, 6, 7
form of, no particular, required, 10

## B

BANKRUPTCY, ground for removal of guardian, **39(i)**, 60

BOND—
guardian to give, if required, **34(a)**, 56
remedy on such, **35**, 58

BRITISH INDIA, definition of, 2

BURDEN OF PROOF of good faith of transactions between guardian and ward, 40

## C

CASTE, LOSS OF
effect of, on right of guardianship, 35, 36

CERTIFICATE OF GUARDIANSHIP
Court having jurisdiction to grant, **9**, 15
effect of, granted but not issued, 7
minority, is not evidence of, 7
power of Court as to grant of, **7**, 12
other Courts to give effect to, on production of certified copy, **16**, 25

NATIONAL ARCHIVES OF INDIA

CHANGE of religion of guardian, 62

CHOICE of custody by minor, **17(3),** 25, 30

CHRISTIANS, age of majority of Native, 6

CIVIL COURTS—See GUARDIAN. APPOINTMENT BY CIVIL COURT.
Court of Wards, cannot interfere with, **3,** 4
power of, to call for report, **46 (1),** 69

COLLECTOR—
appointment of, as guardian, **18,** 38
definition of, **4(6),** 8
guardian, may apply to be appointed, **8,** 15
notice of application to be given to, **11(2),** 19
report to Civil Court by, **46(1),** 69
security, no, to be required from, **34,** 56
subject to local Government in matters under the Act, **23,** 42

COMMENCEMENT of Act, **1,** 2

COMPROMISE of suits by next friend or guardians, **53D,** 78

COSTS—
discretion of Court, of proceedings in the, **49,** 73
suit for, will not lie when Court has not made any order, 74

COURT—
inquiry by, under the Act not summary, **13,** 22, 23
interlocutory order for production of minor and custody of property, power of, to pass, **12,** 20
jurisdiction to entertain application under the Act, what, has, **9,** 15
jurisdiction, can appoint guardian for property beyond, **16,** 25
power of, to appoint or declare guardian, **7,** 12
procedure of, when simultaneous proceedings pending in different Courts, **14,** 23
report, may call for, from Collector or Subordinate Court, **46,** 69

COURT, THE—
meaning of, in the Act, **4(5),** 8
in Section **14,** 23

COURT OF WARDS—
age of majority of minors under, 6
jurisdiction, can assume, in presence of guardians appointed under the Act, 6
jurisdiction of, saving of, **3,** 4
guardian for the property of minor subject to, Court not to appoint, **19,** 38

CUSTODY OF MINOR—
choice by minor as to, **17(3),** 25, 30
order as to temporary, pending application, **12,** 20
right of guardian to, **24,** 43

CUSTODY OF MONEYS AND SECURITIES, frame of rules by High Court, as to, **50(1)(g),** 74

## D

DECLARATION of guardianship, what is, 14

DISCHARGE of guardian appointed by Court, **40,** 63

DISTRICT COURT, definition of, **4(4),** 8

NATIONAL ARCHIVES OF INDIA

## E

EAST INDIANS—See AGE OF MAJORITY.

EDUCATION—
child to have religious and moral, 43
control child's, right of father to, 37
duty of guardian respecting minor's, **24,** 43
frame of rules by High Court respecting ward's, **50(i),** 75
wishes of father with respect to minor's, 44
religious, 32

EUROPEAN BRITISH SUBJECT—
who is, **4(7),** 8
subject to the Act, 2
age of majority of, 6
appointment of mother as guardian in the case of, **15(2),** 24
guardian by mother in the case of, **5,** 9, 10
father in the case of, **5,** 9

EUROPEAN BRITISH SUBJECTS—
power of parents to appoint guardian in the case of, **5,** 9
rights of parents to be appointed guardian in the case of, **17(4),** 25, 31

EUROPEAN DESCENT, meaning of Christian of, 9

EVIDENCE—
hearing of, in applications for appointment of guardian, **13,** 22
horoscope is no, of minority, 7
minority, of, 7
order appointing guardian is no, of minority, 7
statement of relatives are admissible in, 72

EXECUTION, stay of, pending appeal, 72

EXECUTORS, power of, over property under Mahamedan law, 34

## F

FATHER—
*Hindu law—*
right of guardianship of, 32
right of, to guardianship of illegitimate children, 33
right of, to give in marriage, 34
testamentary appointment by, 11

*Mahamedan law—*
executor of, right of, 34
right of guardianship of, 34
right of, to guardianship of illegitimate children, 34
right of, to give in marriage, 35
testamentary appointment by, 11

*Persons other than Hindus and Mahamedans—*
right of, to guardianship, 26
right of, to be appointed guardian when European British subject, **17(4)** 25
testamentary appointment by, 11
appointment of guardian of person when, is alive, **19(b),** 39
loss of right of guardianship by, 26
wishes of, relative to minor's education, 32, 44

NATIONAL ARCHIVES OF INDIA

FEMALE MINOR—
guardianship of, after marriage (Hindu law), 33
guardianship of, after marriage (Mahamedan law), 35
guardianship of, when husband not unfit, **19(a)**, 38
interlocutory order for production and custody of, **12**, 20
male may be appointed guardian of, 28
FINALITY of certain orders under the Act, **48**, 73
FINE—
appeal against order imposing, **47(j)**, 71
prospective order imposing, 68
FIRM cannot be appointed guardian of minor, 10
FRAUD, orders obtained by, may be set aside, 73

## G

GIFT by minor to guardian, 41
GOVERNOR GENERAL IN COUNCIL, report to, **14**, 23
GUARDIAN—
definition of, **4(2)**, 7
minor cannot act as, **21**, 41
Exception, **21**, 41
*Natural Guardians*—
right of, recognised by Courts, 12
*Hindu law*—
ruling power is supreme, 32
guardianship of minor wife, 33
widow, 33
illegitimate children, 33
member of joint Hindu family, 33
*Mahamedan law*—
guardianship of illegitimate children, 34
minor wife, 35
*Guardianship of persons other than Hindus and Mahamadans*—
guardianship of illegitimate children, 32
*Testamentary Guardians*—
appointment of, **5**, 9, **6**, 10
by minor, 9, **11**
mother, **5**, 9, 10, **11**
Hindu law, under, 11
Mahamedan law, under, 11
by persons other than Hindus and Mahamadans, **11**
to illegitimate children, 11
form of appointment of, 10
powers of, **28**, 48
status of, 10
who can be appointed, 10
*Loss of right of guardianship*—
caste, on account of loss of, 35
father, by, 26
Hindu widow, by remarried 33
Mahamedan widow, by, 34
religion, on account of change of, 62

NATIONAL ARCHIVES OF INDIA

GUARDIAN—*contd.*
*Appointment by Civil Court—*
appear, who may, on application, 22
apply, persons entitled to, for appointment, **8,** 15
appointment not evidence of age, 7
*bonâ fide*, application must be, **12,**
bond and security by guardian, **34(a),** 56
Collector, appointment of, in virtue of office, **18,** 38
Court, to what, application to be made, **9,** 15
Court, in what cases, to appoint or declare guardian, **7,** 12, 13
Court cannot appoint guardian, cases where, **19,** 38
Courts of Wards, saving of jurisdiction of, **3,** 4
Court of Wards, guardian of property not to be appointed when minor is under, **19,** 38
declaration of willingness of proposed guardian, **10,** 18
effect of order appointing guardian, **7(2), 7(3),** 12
fees to go to Government when Government officer appointed guardian, **22(2),** 42
female, guardianship of, 28
fixing of day, and service of notice of application, **11,** 19, 20
form of application for appointment of guardian, **10,** 16; Appx. C.
guardian not to be appointed when minor is on the point of attaining majority, 14
High Courts, saving of jurisdiction of chartered, **3,** 4
individuals only can be appointed, 10
joint family property, guardianship of share in, 13
joint guardians may be appointed, **15,** 24
jurisdiction to appoint guardian not dependent on property, 18
jurisdiction, order of appointment applies to property outside, 16
jurisdiction, guardian of property beyond **16,** 25
legislation previous to the Act, 1
married female, guardian of person of, not to be appointed when husband not unfit, **19(a),** 38
matters to be considered by Court in selecting guardian, **17,** 25
age, sex, and religion of minor to be considered, **17(2),** 25
character, capacity and relationship of proposed guardian to be considered **17(2),** 25
welfare of minor is of supreme importance, 26
wishes, if any, of a deceased parent, to be considered **17(2),** 25
wishes of the minor to be considered, **17(3),** 25
opposition to application, 22
preference to mother, when Court shall give, **17(4),** 25
father, when Court shall give, **17(4),** 25
procedure to be followed by Court on admission of application, **11,** 19
procedure at hearing of application, **13,** 22, 23
remuneration of guardian, **22(1),** 42
separate guardians for person and property, **15(4),** 24
any one or more of the properties, **15(5),** 24
simultaneous proceedings in different Courts, **14,** 23
status of guardian appointed by Court, 14
successor, appointment of, to guardian dead, discharged or removed, **42,** 65
temporary custody of minor and of property pending appointment of guardian, **12,** 20, 21
will, person cannot be appointed guardian against his, **17(5),** 26

NATIONAL ARCHIVES OF INDIA

GUARDIAN—*contd.*
*Duties of Guardians—*
fiduciary relation of guardian to ward, **20,** 39
gift or sale by ward to guardian, 40
maintenance, duty with regard to ward's, 44
profit, guardian must not make, out of office, **20,** 39
religious and other ceremonies, duty with regard to, **34(e),** 56
transactions after ward attains majority, **20(2),** 40, 41
trustee, guardian is a, 40, 47
*Liabilities of Guardians—*
account, suit for, after termination of guardianship, 57
advantage gained by guardian, 40
penalty for contumacy, **45,** 67
trustee, guardian liable as, 40, 47
but not exonerated by ward's 40
suit where administration bond taken, **35,** 58
no bond taken, **36,** 58
*Powers of Guardians—*
*Guardians of persons—*
custody, right to the, of ward, 43
enforcement of right to custody, 45
joint guardians, right of, survives, **38,** 60
removal of ward from jurisdiction, **26(1),** 46
when powers cease, **41(1),** 63
*Guardians of property—*
bind, guardian cannot personally, minor, 52
care in making order as to sale, etc., 53, 54
conditions imposed by order, **31(3),** 52
contents of order, **31(2),** 52, 53
natural guardians unaffected by restrictions of the Act, 51
opinion, advice or direction by Court, **33,** 54
regulating conduct and proceedings of guardians, one of several guardians may apply for an order, **43,** 66
sale, gift, exchange or lease by guardian, **29,** 48
variation of powers of guardian of property, **32,** 54
voidability of transfers made without permission, **30,** 49
when powers cease, **41 (2),** 64
*Removal of Guardians—*
deliver accounts on removal, order to, **41 (3),** 64
discharge of guardian, **40,** 63
enquiry before removal, 62
injunction and receiver, 62, 63
make over property on removal, order to, **41(3),** 64
natural guardians, removal of, 61
removal of guardians, grounds for, **39,** 60
testamentary guardian, exception in case of, **39,** 61
*Termination of guardianship*—See GUARDIAN. REMOVAL.
authority of guardians when to cease, **41,** 63
successor, appointment of, to guardian dead, discharged or removed, **42,** 65
survivorship, right of, among joint guardians, **38,** 60

H

HEALTH OF WARD, duty of guardian with respect to, **24,** 43



NATIONAL ARCHIVES OF INDIA

HIGH COURT—
appoint guardian, cannot, when a competent Court has already appointed one, 5
appointment and removal of guardians, principles of, by, 4
jurisdiction of, saving of, **3,** 4
jurisdiction of, under Charter Act, 5
power of, to make rules, **50,** 74
report to, of simultaneous proceedings in different Courts, **14(2),** 23
revision of orders by, **48,** 73

HINDU LAW—See AGE OF MAJORITY. GUARDIAN.

HINDU WIDOW, right of guardianship of remarried, 33

HOROSCOPE not evidence of age, 7

HUSBAND—
appointment by Civil Court of guardian to minor wife when, is alive, **19 (a)** 38
right of, to guardianship of wife under Hindu law, 33
Mahamedan law, 35

ILLEGITIMATE CHILDREN—See FATHER. GUARDIAN.
guardianship of, under English law, 32
Hindu law, 33
Mahamedan law, 34
testamentary appointment of guardian to, 11

ILL-TREATMENT OF WARD ground for removal of guardian, **39(d),** 60

IMPRISONMENT—See PENALTY.

INCAPACITY ground for removal of guardian, **39(c),** 61

INDIAN MAJORITY ACT—See AGE OF MAJORITY—See Appx. B.
uniform age of majority, introduces a, 6

INFANT, custody of, under Mahamedan law, 34

INFANT WIFE—See WIFE.

INJUNCTION—
jurisdiction, Court has no, to issue, under s. 43 of the Act, 67
pending removal of guardian, 62

INSOLVENCY, ground for removal of guardian, **39(i),** 60

'INSTRUMENT,' meaning of, in s. 39, 61

INTEREST, adverse, ground for removal of guardian, **39(g),** 60

INTERLOCUTORY ORDER—
power of Court to make, for production of minor, **12,** 20, 21
for interim protection of person and property of minor, **12,** 20, 21

INVENTORY, guardian to deliver, of minor's property, **34(b),** 56

INVESTIGATIONS under the Act to be full and regular, 13, ft.-note, 2

JOINT FAMILY, appointment of guardian of share in, property, 13
minor managing member of, may be guardian, **21,** 41

NATIONAL ARCHIVES OF INDIA

JOINT FAMILY PROPERTY, guardianship of share in, 13

JOINT GUARDIANS—
appointment of, **15,** 24
survivorship, right of, among, **38,** 60

JURISDICTION—
appoint guardian, what Court has, to, **9,** 15
effect of order appointing guardian on property outside, 16
independent of property, is, 18, ft.-note, 2

## L

LEASE—See TRANSFER.

LEGISLATION, previous, respecting the law of guardian and ward, 1

LIABILITY of minors for offences against Criminal law, 31, ft.-note, 4

LIMITATION
acknowledgment of debt by guardian, whether, saves, 47
suit against guardian, for, 59

LOCAL extent of the Act, **1,** 2

LOCAL GOVERNMENT—
approval of, necessary for certain rules framed by High Court under the Act, **50 (2),** 75
Collector as guardian to be under control of, **23,** 42

LOSS OF CASTE, effect of, on guardianship, 35

LOSS OF RIGHT OF GUARDIANSHIP—See GUARDIAN.

## M

MAHAMEDAN LAW—See AGE OF MAJORITY. GUARDIAN. EXECUTORS.

MAINTENANCE, duty of guardian with respect to, of ward, 44

MAJORITY—See AGE OF MAJORITY.
age of, under Hindu law, 6
Mahamedan law, 6
the Indian Majority Act, 6
age of, 21, in case of certificates granted, 6
even in cases where certificates ordered to be granted but not taken out, 7
or even if guardian appointed ceases to act, 7

MAJORITY ACT, INDIAN—See APPX. B.
age of majority under the, 6
amendment of the, **52,** 75

MARRIAGE—
capacity for, not affected by the Indian Majority Act, Appx. B.
order of guardianship for, under Hindu law, 34
Mahamedan law, 35

MINOR—See AGE OF MAJORITY.
who is a, **4 (1),** 6
Court of Wards, meaning of, under the jurisdiction of, 39
everybody, up to the age of 18, 6
choice of, when to be considered when Court appoints guardian, **17 (3),** 25, 30

NATIONAL ARCHIVES OF INDIA

MINORITY,
effect of certificate granted but not taken out in extending, 7
evidence of, 7
extended to 21 years in case Court of Wards assumes superintendence, 6
also when guardian is appointed by Court, 6

MITAKSHARA LAW, appointment of guardian of share in joint family property governed by, 13

MOTHER—See GUARDIAN.
*Hindu law*—
authority to appoint guardian, has no, 11
father may exclude, from guardianship, 11, ft.-note 2
remarriage of, effect of, on guardianship, 33
right of guardianship of, 32
*Mahamedan law*—
right of, to custody of child, 34
illegitimate child, 35
loss of right of guardianship by, on account of remarriage, 34
*Persons other than Hindus and Mahamedans*—
appoint guardian, cannot, 11
unless European British subject, **5**, 9
Court may consider appointment by, 11
illegitimate children, right of, to guardianship of, 32

N

NATIVE CHRISTIANS—See AGE OF MAJORITY.

NATURAL GUARDIAN—See GUARDIAN.

NEAR GUARDIANS (Mahamedan Law)—
who are, 34
powers of, 34

NEAR RELATIONS, meaning of, 18

NOTICE—
application for appointment of guardian, of, **11**, 19
Collector when entitled to, **11(2)**, 19
guardian before making order under s. 43(1), (2), to, **43(3)**, 66
served, on whom, **11**, 19
service of, mode of, **11**, 19, 20

O

OFFENCE,
guardian convicted of, when to be removed, **39(f)**, 60

P

PENALTY—
disobeying order as to custody, for, **45**, 67
neglect of obligation by guardian, for, **45**, 68
neglect to deliver property and accounts, for, **45**, 68
producing minor, for not, **45**, 67
removal of ward from jurisdiction, for, **44**, 67

PERMISSION OF COURT—
alienation of ward's property, necessary for, **29**, 48
when granted, **31**, 52

NATIONAL ARCHIVES OF INDIA

PETITION FOR APPOINTMENT OF GUARDIAN—See GUARDIAN.

PLACE OF RESIDENCE—See RESIDENCE.

PRACTICE with respect to permitting transfers under s. 29, **31,** 52

PROBATE not a condition precedent to obtaining certificate of guardianship, **13**

PROCEDURE—
- frame of rules relating to, in case of applications under ss. 28, 29, **50(c),** 74
- petition for appointment of guardian, of Court on admission of, **11,** 19
- evidence, taking of, at the hearing, **13,** 22
- report proceedings to the High Court, when Court to, **14(2),** 23
- report proceedings to the Governor General in Council, when Court to, **14(3),** 23
- stay proceedings if apprised of similar proceedings in a different Court, Court to **14,** 23

PRODUCTION of female minor, **12(2),** 20

of minor pending appointment of guardian, **12,** 20

PROOF—See BURDEN OF PROOF.

PURDANASHEEN, production of minor, **12,** 21

R

RECEIVER, appointment of, pending removal of guardian, 63

RELIGION—
- brought up, in what, children to be, 32
- change of, by father, 35
- by guardian, 62

RELIGIOUS EDUCATION—
- control, right of father to, of ward, 37
- duty of guardian to give, to ward, 44
- wishes of deceased father with regard to, to be respected, 32, 44

RELIGIOUS rites and usages not affected by the Indian Majority Act, **Appx. B.**

REMARRIAGE of Hindu widows, 33

REMOTE GUARDIANS (Mahamedan law)—
- who are, 34
- powers of, 34

REMOVAL—
- guardian appointed by Court, of **39,** 60
- testamentary guardian, of, **39,** 60
- ward from jurisdiction, of, **26,** 46

REMUNERATION—
- appeal against order refusing, no, 42, 72
- guardian appointed by Civil Court, of, **22,** 42
- testamentary guardian, of, **20,** 39

REPORT—See COLLECTOR.
- power of Court to call for, **46(1),** 69
- simultaneous proceedings in different Courts, to High Court of, **14 (2),** 23
- Governor General in Council of, **14 (3),** 23

NATIONAL ARCHIVES OF INDIA

RESIDENCE, meaning of, 16

RESIGNATION of guardian appointed by Court, **40,** 63

RES JUDICATA, 73

RIGHT OF GUARDIANSHIP, loss of—See GUARDIAN.

REVISION of orders by High Court, **48,** 73

REVIEW of order, 73

RULES—
- High Courts, to be framed by, under the Act, **50,** 74
- framed by Calcutta High Court, Appx. C

S

SALE BY GUARDIAN appointed by Court, **30,** 49

SCHEDULED DISTRICTS, Act applies to the, 2

SECURITY—
- guardian, may be taken from, **34,** 56
- Collector, but not from, **34,** 56
- rules, frame of, by High Court relating to, **50(b),** 74

SERVICE OF NOTICE of application, manner of, 20

SIMULTANEOUS proceedings in different Courts, **14,** 23

STEP-MOTHER, right of guardianship of, under Hindu law, 36

SUBORDINATE COURT, report by, **46,** 69

STAMP DUTY, no, on order appointing or declaring guardian under the Act, See Schedule; also Statement of Objects and Reasons.

SUIT—
- account against guardian, for **36,** 58
- guardian *ad litem* in, against minor, guardian appointed under the Act to be, **53B,** 77
- guardian, against, where administration bond taken, **35,** 58
  not taken, **36,** 58
- limitation of, for account against guardian, 59
- minor, on behalf of, to be filed by guardian appointed under the Act, **53A,** 76
- partition, for 13

SUMMARY power of Courts with respect to custody of minors, **25,** 45, 45, ft.-note 3

T

TENDER YEARS, meaning of, 31

TESTAMENTARY GUARDIAN—See GUARDIAN.

TRANSACTIONS between guardian and ward, 40

TRANSFER—
- guardian appointed by Court, by, **30,** 49
- permission to, when to be granted by Court, **31,** 52
- order permitting, what to state, **31,** 52, 53
- voidability of, made by guardian without permission, **30,** 49

NATIONAL ARCHIVES OF INDIA

## V

VERIFICATION of application for appointment or declaration of guardian under the Act, **10,** 16; see also Appx. C

## W

WARD—
definition of, **4(3),** 8
education of, **24,** 43
maintenance of, 44
marriage of, 44

WIDOW—
loss of right to custody of minor on remarriage of Hindu, 33
Mahamedan, 34

WIFE—
guardianship of, under Hindu law, 33
Mahamedan law, 35
appointment of guardian by Court to person of minor, **19(a),** 38
right to custody of, 33, 35

WILLINGNESS of proposed guardian, **10(3),** 18, **17(5),** 26

WISHES—
deceased father, of, with regard to children's religious education, 32
minor, of, as to custody, 30

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